

Before the  
**Federal Communications Commission**  
 Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	WT Docket No. 97-82
Rules Regarding Installment Payment	)	
Financing For Personal Communications	)	
Services (PCS) Licensees	)	

**ORDER ON RECONSIDERATION  
 OF THE SECOND REPORT AND ORDER**

**Adopted: March 23, 1998**

**Released: March 24, 1998**

By the Commission: Commissioners Ness and Powell concurring in part, dissenting in part, and issuing separate statements; Commissioner Tristani issuing a statement.

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## I. INTRODUCTION

1. On September 25, 1997, the Commission adopted a *Second Report and Order and Further Notice of Proposed Rule Making* ("*Second Report and Order*" and "*Further Notice*") establishing March 31, 1998, as the deadline for broadband Personal Communications Services ("PCS") C and F block licensees to resume installment payments.<sup>1</sup> In addition, the Commission offered C block licensees a choice of three alternative payment options in lieu of resuming payments under the terms of the original payment plan. The three options were intended to provide limited relief to C block licensees experiencing financial difficulties, while preserving the fairness and integrity of the auction process.

2. In response to the rulings in the *Second Report and Order*, we received 37 petitions for reconsideration, 17 oppositions to the petitions, 16 replies to the oppositions, and 38 *ex parte* filings.<sup>2</sup> After considering the arguments raised in those filings, we generally affirm the framework established in the *Second Report and Order*, but we make a few modifications designed to provide C block licensees greater flexibility in making their elections. We believe that these changes improve upon the *Second Report and Order* by allowing more existing licensees to adjust their business plans and remain in the wireless market to compete against other providers, while also providing for the return of spectrum to the Commission so that other entrepreneurs will have opportunities to obtain broadband PCS licenses in a reauction. In a forthcoming Order, we will address comments filed in response to the *Further Notice*, which covers rules for the reauction of returned C block licenses.

## II. BACKGROUND

3. Consistent with Congress' mandate to promote the participation of small businesses and other "designated entities" in the provision of spectrum-based services,<sup>3</sup> the Commission limited eligibility in the initial C block auctions to entrepreneurs and small businesses. The C block auction concluded on May 6, 1996, and the subsequent reauction of defaulted licenses concluded on July 16, 1996, with a total of 90 bidders winning 493 licenses. The winning bidders were permitted to pay

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<sup>1</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 (1997).

<sup>2</sup> A list of the parties that filed pleadings in response to the *Second Report and Order*, and the abbreviations used to refer to such parties, is attached as Appendix A. Although CX Systems and Dorne & Margolin filed petitions for reconsideration after the filing deadline, we will accept their filings as *ex parte* filings. For the sake of consistency, we refer to filings as oppositions if they were filed at the time oppositions were due, even if they are supportive of arguments raised in the petitions.

<sup>3</sup> Communications Act of 1934, as amended ("Communications Act") § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

90 percent of their net bid price over a period of ten years, paying only interest for the first six years and paying both interest and principal for the remaining four years.<sup>4</sup>

4. On March 31, 1997, the Wireless Telecommunications Bureau (the "Bureau") suspended the deadline for payment of installment payments for all C block licensees.<sup>5</sup> The suspension was implemented in response to a joint request from several C block licensees seeking modification of their installment payment obligations and to allow more time for discussions with other federal agencies concerning "the transfer of responsibilities for certain debt functions related to [the installment payment] program."<sup>6</sup> On April 28, 1997, the Bureau extended the suspension to F block licensees.<sup>7</sup> As mentioned above, on September 25, 1997, the Commission ended this suspension and established March 31, 1998, as the deadline for C and F block licensees to resume their installment payments.<sup>8</sup>

5. After reviewing various proposals for relief, the Commission decided in the *Second Report and Order* to allow each C block licensee to elect one of three options for all of its licenses in lieu of continuing payments under the licensee's original installment payment plan.<sup>9</sup> Each of the three options -- disaggregation, amnesty, and prepayment -- was intended to provide limited relief to financially troubled licensees without harming the integrity of the auction process.<sup>10</sup> The Commission determined that further relief for F block licensees was unnecessary.<sup>11</sup>

6. In the *Second Report and Order*, the Commission required C block licensees to file a written election notice on or before January 15, 1998, specifying whether they would resume payments under the terms of the original installment payment plan or would proceed under one of the alternative options.<sup>12</sup> On January 7, 1998, we postponed the election date until February 26, 1998, in order to resolve issues raised on reconsideration before licensees submitted their elections.<sup>13</sup> In

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<sup>4</sup> See 47 C.F.R. § 24.711(b)(3). The net bid price is equal to the winning bid less any bidding credit for which the licensee was eligible. See 47 C.F.R. § 24.712.

<sup>5</sup> See *Installment Payments for PCS Licenses, Order*, 12 FCC Rcd 17,325 (WTB 1997).

<sup>6</sup> *Id.*, 12 FCC Rcd at 17,325 para. 1.

<sup>7</sup> See "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," *Public Notice*, DA 97-883 (released April 28, 1997) at 2.

<sup>8</sup> *Second Report and Order*, 12 FCC Rcd at 16,448 para. 21.

<sup>9</sup> See *id.*, 12 FCC Rcd at 16,444-46 paras. 15-17.

<sup>10</sup> See *id.*, 12 FCC Rcd at 16,437-38 para. 2.

<sup>11</sup> *Id.*, 12 FCC Rcd at 16,447 para. 20.

<sup>12</sup> *Id.*, 12 FCC Rcd at 16,470 para. 70.

<sup>13</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order*, FCC 98-2 (released January 7, 1998) at

addition, we announced that the reauction of spectrum surrendered by C block licensees pursuant to their elections would begin on September 29, 1998.<sup>14</sup> On February 24, 1998, we revised both the February 26, 1998, election date and the March 31, 1998, payment resumption date.<sup>15</sup> We changed the election date to 60 days from publication of this Order in the *Federal Register* and the payment resumption date to at least 30 days after the new election date.<sup>16</sup>

### III. OVERVIEW

7. The Commission determined in the *Second Report and Order* that it would serve the public interest to provide a variety of relief mechanisms to assist C block licensees that were experiencing difficulties in meeting the financial obligations under the installment payment plan. The Commission believed the "extraordinary procedures" it adopted to offer relief to C block licensees appropriately balanced a number of important policy goals.<sup>17</sup> In formulating a resolution to the complex issues involved, one of the Commission's foremost objectives was to preserve the integrity of the auction process and to maintain public confidence in the stability of the Commission's auction rules.<sup>18</sup> The Commission also believed it was essential to ensure fair and impartial treatment for all auction participants, including winning bidders, unsuccessful bidders, and licensees in competing services.<sup>19</sup> At the same time, the Commission was cognizant of its statutory mandate to promote economic opportunity and to encourage broad participation in the provision of spectrum-based services.<sup>20</sup> In addition, the Commission attempted to implement a workable solution in a timely manner that would facilitate rapid introduction of service to the public without further regulatory or marketplace delay.<sup>21</sup>

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para. 2 ("*Election Date Order I*").

<sup>14</sup> *Id.* at para. 3.

<sup>15</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order*, FCC 98-28 (released February 24, 1998) ("*Election Date Order II*").

<sup>16</sup> *Id.* at paras. 2-3. The Bureau will issue a public notice setting forth the procedures for filing an election notice.

<sup>17</sup> *Second Report and Order*, 12 FCC Rcd at 16,437-38 para. 2.

<sup>18</sup> *Id.*, 12 FCC Rcd at 16,437-38 paras. 2-3. *But see* MFRI Reply at 2-6 (the real solution to maintaining auction integrity is to resolve bid signaling practices; a modest adjustment to the installment payment plan is not related to auction integrity); Hyundai Reply at 2-3 (auction integrity is not a sufficient basis for denying relief).

<sup>19</sup> *Second Report and Order*, 12 FCC Rcd at 16,437-38 paras. 2-3.

<sup>20</sup> *Id.*, 12 FCC Rcd at 16,437-38 para. 2 (citing Communications Act § 309(j)(3)(A), (B), 47 U.S.C. § 309(j)(3)(A), (B)).

<sup>21</sup> *Id.*, 12 FCC Rcd at 16,437-39 paras. 2, 4-5.

8. We believe the approach adopted in the *Second Report and Order* largely accomplishes these objectives. The relief provided C block licensees will speed deployment of service to the public by easing lenders' and investors' concerns regarding regulatory uncertainty and by potentially making more capital available for investment and growth. By facilitating the provision of service to consumers, the Commission advanced Congress' objective to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public."<sup>22</sup> In addition, the mechanisms the Commission created to help these small businesses remain viable competitors in the marketplace furthered its statutory mandate to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses . . . ."<sup>23</sup> However, out of fairness to bidders that withdrew from the auction and to maintain the integrity of the auction process, the Commission rejected proposals that would have significantly altered the amounts paid for individual licenses. Mindful of the effect its decision would have on future auctions, the Commission opted for a more modest approach.

9. Although we believe the decision adopted in the *Second Report and Order* largely should be maintained, we believe that certain aspects of the adopted approach were overly restrictive. A number of petitioners claim that the options presented by the Commission do not provide economically viable alternatives for financially troubled licensees.<sup>24</sup> Indeed, a frequent complaint expressed throughout the numerous petitions is that the available options fall short of providing meaningful relief. We also received several letters from members of Congress asking that we take additional measures to assist C block licensees.<sup>25</sup>

10. After reviewing the extensive record on reconsideration, we believe that a radical departure from the *Second Report and Order* is not warranted.<sup>26</sup> The *Second Report and Order*

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<sup>22</sup> Communications Act § 309(j)(3)(A), 47 U.S.C. § 309(j)(3)(A).

<sup>23</sup> Communications Act § 309(j)(3)(B), 47 U.S.C. § 309(j)(3)(B).

<sup>24</sup> See, e.g., New Wave Petition at 2 (the presented options are not economically viable for numerous licensees and the punitive damages levied will impede network build-out and possibly lead to widespread bankruptcies); GWI Petition at 2 (a major reduction in the license debt is the only commercially viable way for many small businesses to obtain necessary funding); One Stop Wireless Petition at 1 (the options offered do not work for C block licensees); OnQue Petition at 1 (the Commission's options do not provide any stability); Omnipoint Petition at 13 (without further clarification of the Commission's position on bankruptcy, bankruptcy may be a licensee's lowest risk alternative); RFW Reply at 3 (the Commission's punitive provisions likely will increase the number of bankruptcy filings).

<sup>25</sup> The Honorable J. Robert Kerrey *ex parte* filing at 1; The Honorable Barbara Boxer *ex parte* filing at 1-2; The Honorable Albert R. Wynn *ex parte* filing at 1-2; The Honorable Xavier Becerra *ex parte* filing at 1-2; Members of the Congressional Hispanic Caucus *ex parte* filing at 2; The Honorable Richard H. Bryan and The Honorable Harry Reid *ex parte* filing at 1; see also The Honorable Sue W. Kelly *ex parte* filing at 1; The Honorable Thomas Daschle *ex parte* filing at 1; The Honorable Gary L. Ackerman *ex parte* filing at 1.

<sup>26</sup> See AT&T Opposition at 2 (the options offered in the *Second Report and Order* provide sufficient financial relief without undermining the integrity of the auction process); PrimeCo Opposition at 5 ("the *Second Report and*

created an innovative solution to requests from C block licensees needing financial relief. Certain requirements, however, may constrain many C block licensees from making use of the relief measures offered. We believe that, with a few adjustments to the adopted approach, we can better effectuate the Commission's intent to provide C block licensees a limited measure of relief under the unique but varied circumstances presented. We therefore will leave the basic framework intact, but we will alter it slightly to allow licensees to be more flexible in making their elections for licenses in different geographic areas, to use more of the down payments already on deposit, and to be more flexible in the use of those down payments. We believe that this approach improves upon the *Second Report and Order* by better enabling C block licensees to remain participants in the wireless market, which will promote competition and the delivery of new services to the public.

11. First, we will eliminate the requirement that a licensee must make the same election for all its licenses. Instead, a licensee may make different elections for the different Major Trading Areas ("MTAs") in which it holds licenses. The election made for an MTA will apply to every Basic Trading Area ("BTA") license held by the licensee in that MTA. As under the *Second Report and Order*, the possible elections include resumption of payments, amnesty, prepayment, or disaggregation. As part of the modifications to the adopted approach, we will also permit a combination of disaggregation and prepayment. Resumption of payments and prepayment of 30 MHz licenses will remain essentially the same as in the *Second Report and Order*. We will, however, modify the amnesty and disaggregation options, as follows.

12. Under the revised amnesty option, a licensee may return to the Commission licenses in any MTA it wishes so long as it returns all its BTA licenses within the MTA. The entire outstanding debt on the returned licenses will be forgiven. For each MTA that is returned, the licensee will have two choices, and its decision will apply to all its BTA licenses within the MTA. If the licensee wishes to bid on those licenses it returns in the reauction, none of the down payment associated with such licenses will be available, consistent with the *Second Report and Order*. Alternatively, the licensee may opt to forgo the opportunity to bid on its returned licenses in exchange for a credit of 70 percent of the down payment made on the licenses. This credit may be used to prepay the entire principal owed for a retained MTA with 30 MHz licenses. This, essentially, is the prepayment option as adopted in the *Second Report and Order*. Alternatively, we permit a combination of prepayment and disaggregation, so that the licensee may prepay the entire principal owed for the retained 15 MHz licenses of an MTA that has been disaggregated.

13. As under the *Second Report and Order*, a licensee that disaggregates an MTA may continue making installment payments on the retained spectrum. However, for each disaggregated license, the licensee will now receive credit for 40 percent of the down payment applicable to the

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*Order* reflects a reasonable balancing of Congress' statutory objectives and marketplace considerations and should be affirmed"); Fidelity Capital Opposition at 5 (the *Second Report and Order* "presents a fair and balanced plan to provide relief to struggling C-Block licensees, while not disadvantaging licensees who are successfully building out their systems"); Northcoast Opposition at 4 (significant change would be fundamentally unfair to licensees that have honored their financial commitments); AirGate Opposition at 5-6 (the financing options available to C block licensees, including the Commission's original installment payment plan, are more generous than financing offered to any participants in other auctions); Frontier Reply at 2 (significant relief would be unfair to bidders that were unsuccessful in the auction process).

returned 15 MHz of spectrum. This 40 percent credit may be applied only to the 15 MHz of spectrum retained from the same license. It may be used to reduce the principal outstanding and/or to pay "Suspension Interest" (i.e., all unpaid simple interest accruing from the date of license grant through March 31, 1998). Because the down payment applicable to the retained spectrum will be considered the down payment for that spectrum and the licensee thus retains 100 percent of that portion of the down payment, the licensee in effect receives a blended credit of 70 percent of the total down payment made on the full 30 MHz license.

14. Alternatively, under our modified approach, a licensee will be allowed to prepay a disaggregated MTA. In that case, the licensee will receive credit for 70 percent of the down payment applicable to the returned spectrum. Because the licensee retains 100 percent of the portion of the down payment associated with the retained portion of the license, the licensee in effect receives a blended credit of 85 percent of the total down payment. The 70 percent credit may be applied toward the prepayment of a retained MTA with 30 MHz licenses (so long as the retained 15 MHz license is prepaid) and/or toward the prepayment of the retained 15 MHz licenses of an MTA that has been disaggregated.

15. In addition, we adopt the following limited modifications: (1) we extend to 90 days the 60-day non-delinquency period for payments not made on the payment resumption date, and we impose a 5 percent late payment fee for payments made within this 90-day non-delinquency period; (2) we instruct the Bureau to modify the payment schedules of all C and F block licensees so that all payments will be due on the same date; (3) we eliminate the build-out exception to the amnesty option because it is rendered moot by our modified approach; and (4) for purposes of the rule that a licensee electing prepayment that does not have sufficient funds to prepay all its BTA licenses within an MTA may prepay only the BTA licenses within the MTA that it can afford, we clarify that a licensee can "afford" as many BTA licenses within an MTA that it can prepay using only the amount of credit available to the licensee for prepayment.

#### **IV. MTA-BY-MTA ELECTIONS**

##### **A. Background**

16. Under the *Second Report and Order*, a licensee was not permitted to make more than one election. Therefore, whatever election was chosen would apply to all licenses held by the licensee. For practical purposes, there was a limited mixing of options to the extent that payments would have to be resumed under the terms of the original installment plan with respect to any licenses not halved under the disaggregation option and any licenses retained under the build-out exception to the amnesty option. Licensees were precluded, however, from forming any other combinations among the options. For example, a licensee could not prepay some licenses and disaggregate others.

##### **B. Discussion**

17. By offering a menu of options, the Commission attempted to accommodate the fact that different licensees face different circumstances. However, the requirement that a licensee make the same election for all its licenses failed to account for the situation where a licensee faces different circumstances in its different license areas. We believe that licensees will be able to take better

advantage of the varied benefits of the options if they are allowed to make different elections for the different areas in which they hold licenses. Therefore, we eliminate the requirement that a licensee must make the same election for all its licenses. We agree with NextWave and other parties that instead we should allow a licensee to make one election for each MTA in which it holds licenses.<sup>27</sup> In other words, the same election must be applied to each BTA license held in a given MTA, but different elections may be selected for different MTAs. For this purpose, the available elections that may be applied to an MTA are the resumption of payments under the existing installment payment plan, amnesty, prepayment, disaggregation, and a combination of disaggregation and prepayment. These elections are discussed in detail below.

18. We believe the MTA is the appropriate unit for making an election for similar reasons that the Commission previously determined it was an appropriate cut-off point.<sup>28</sup> We do not believe licensees should be permitted to make elections on a BTA-by-BTA basis. As the Commission stated in the *Second Report and Order*, allowing options to be applied at the BTA level would threaten the interdependency of licenses and would limit the potential for aggregation of licenses within an MTA.<sup>29</sup> It also would permit licensees to "cherry-pick" the most desirable markets within an area.<sup>30</sup> The return of only the less desirable markets would discourage participation in the reauction and could substantially delay the deployment of service to those areas. This danger does not exist at the MTA level because MTAs are large enough market areas that the value of an MTA would not be diminished if it was surrendered and its neighboring MTAs were not.

19. By allowing elections to be made on an MTA-by-MTA basis, we enable licensees to make election decisions that are not based solely on the elements of each option, but rather on their own business plans and financial situation. For example, a licensee may be successfully financing its license holdings on the east coast but experiencing difficulties in financing its west coast holdings. Under the approach adopted in the *Second Report and Order*, the prepayment option was the only means by which the licensee could return its west coast licenses while keeping its east coast licenses.<sup>31</sup> We believe that the decision to retain or surrender licenses in an MTA should depend on the particular circumstances surrounding those licenses. The decision should not be driven by the terms of the options or by unrelated circumstances in other areas, which might dictate a universal election unsuitable for the licenses in that MTA.

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<sup>27</sup> NextWave Reply at 8; *ex parte* letter jointly filed by 43 companies on February 20, 1998, at 1. We also received letters from members of Congress generally supporting greater flexibility regarding licensees' ability to choose which licenses may be returned. The Honorable Xavier Becerra *ex parte* filing at 1; Members of the Congressional Hispanic Caucus *ex parte* filing at 2.

<sup>28</sup> *Second Report and Order*, 12 FCC Rcd at 16,455, 16,458, 16,463-64, 16,469 paras. 38, 44, 57, 67.

<sup>29</sup> *Id.*, 12 FCC Rcd at 16,463, 16,469 paras. 56, 67.

<sup>30</sup> *Id.*, 12 FCC Rcd at 16,455, 16,463-64, 16,469 paras. 38, 56-57, 67.

<sup>31</sup> Note, however, that under the build-out exception to the original amnesty option, the licensee could retain any licenses that satisfied the build-out requirement. *Id.*, 12 FCC Rcd at 16,463-64 para. 57.

20. Further, we believe that MTA-by-MTA elections will promote rapid deployment of service to the public.<sup>32</sup> Licensees will have more opportunity to localize their business plans by surrendering licenses in markets where success now seems unlikely due to financial difficulties. As a result, they will be able to focus on providing service in those markets where they have retained their licenses. In addition, the surrendered licenses presumably will be reaucted to entities better positioned to provide service in those license areas. Indeed, we anticipate that MTA-by-MTA elections will produce a more robust and competitive reauction. We expect more licenses to be returned for reauction because a licensee choosing disaggregation or resumption will now be free to surrender licenses it was reluctant to keep, but was forced to do so under the previous terms of those elections. Allowing those licenses to be reaucted to entities that are more committed, or better able, to serve those markets will stimulate competition and benefit consumers. Furthermore, permitting elections on an MTA-by-MTA basis will not undermine the integrity of the auction process because licensees still must pay the full amount of their licenses.

## V. RESUMPTION OF PAYMENTS

### A. Background

21. In the *Second Report and Order*, the Commission rescinded, effective March 31, 1998, the Bureau's prior suspension of the deadline for all broadband PCS C block and F block installment payments.<sup>33</sup> All payments due and owing after March 31, 1998, were to be made in accordance with the terms of each licensee's Note, associated Security Agreement, and the Commission's Orders and regulations.<sup>34</sup> The Commission stated that all rules regarding installment payments and defaults for the broadband PCS C and F blocks would remain in effect, except as modified by the *Second Report and Order*.<sup>35</sup> The Commission ruled that any licensee that failed to remit the payment due on March 31, 1998, and remained delinquent for more than 60 days (in other words, failed to make the March 31, 1998, payment on or before May 30, 1998), would be in default on its license. As the Commission noted, the 60-day non-delinquency period was an exception to existing Commission rules that provide for an automatic 90-day non-delinquency period for each installment payment.<sup>36</sup>

22. The Commission directed in the *Second Report and Order* that Suspension Interest would become due and payable over a two-year period, beginning on March 31, 1998, on which date broadband PCS C and F block licensees would be required to submit one-eighth of the Suspension

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<sup>32</sup> See Communications Act § 309(j)(3)(A), 47 U.S.C. § 309(j)(3)(A).

<sup>33</sup> *Second Report and Order*, 12 FCC Rcd at 16,449-50 para. 25.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* See also 47 C.F.R. § 1.2110(f)(4)(i).

Interest.<sup>37</sup> After March 31, 1998, one-eighth of the Suspension Interest was to be paid along with each regular installment payment on each subsequent payment due date until the Suspension Interest had been fully paid.<sup>38</sup> Payment due dates would conform to those indicated in the Notes executed by the licensees.<sup>39</sup>

23. On February 24, 1998, we issued an order revising the March 31, 1998, payment resumption date.<sup>40</sup> We stated that the payment resumption date would be at least 30 days after the date on which C block licensees must file a written election notice specifying their decision to resume payments under the terms of the original installment payment plan or to proceed under one of the alternative options. The election date was postponed in the same February 24, 1998, order to 60 days after publication of this reconsideration order in the *Federal Register*.<sup>41</sup> As we stated in that order, the Bureau will announce the specific dates for election and payment resumption as soon as this reconsideration order is published.<sup>42</sup>

## B. Discussion

24. By the time they must resume making payments, C and F block licensees will have enjoyed a respite from their payment obligations substantially longer than one year. Several parties, however, seek a much longer deferral of the payment deadline.<sup>43</sup> We do not find their requests

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<sup>37</sup> *Second Report and Order*, 12 FCC Rcd at 16,449-51 paras. 25-27. For those C block licensees that retained licenses under the disaggregation option or under the build-out exception to the amnesty option, the Suspension Interest would be adjusted accordingly. C block licensees that elected the prepayment option or surrendered all licenses under the amnesty option would not be charged Suspension Interest.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* We previously provided specific examples of the schedule for paying the Suspension Interest. *See id.*, 12 FCC Rcd at 16,450-51 para. 27 and nn.53-54.

<sup>40</sup> *Election Date Order II*.

<sup>41</sup> *Id.* The election date had been postponed once before on January 7, 1998. *Election Date Order I*.

<sup>42</sup> *Election Date Order II* at para. 3.

<sup>43</sup> *See* Alpine Petition at 13 and Alpine Reply at 8-9 (suggesting a moratorium on interest payments for up to five years); Cellexis Petition at 1, 5 and Cellexis Reply at 2-5 (supporting an earlier proposal by the U.S. Small Business Administration ("SBA") for a five-year deferral); McBride Petition at 5 (proposing elimination of all payments for the first seven years, with no interest on the debt for the first five years); Meretel Petition at 1-2 (asking the Commission to reconsider the deferral issue); MFRI Petition at 3 (endorsing a suspension of all payments until the end of the fifth year of the license, with the balance of principal and interest paid over the remaining five years of the license); NextWave Petition at 4-5, 22-25 (proposing a "modest deferral" to facilitate network deployment, while requiring payment in full with accrued interest within the existing license term); NextWave Reply at 5-8 (proposing resumption of payments phased in on a graduated basis for first three years); New Wave Petition at 1, 2 (requesting a deferral spanning a period of five or more years); Northern Michigan Petition at 5-6 (indicating a preference for an additional two-year suspension); One Stop Wireless Petition at 2-3 (seeking consideration of SBA proposal for short-term deferral combined with extension of five-year construction deadline, or long-term deferral with no change in

persuasive. No matter what deadline we establish, it is inevitable that some licensees will seek more time to pay. As stated in the *Second Report and Order*, a more extensive deferral would be unfair to unsuccessful bidders that might not have withdrawn from the auction had they known of deferral opportunities.<sup>44</sup> The Commission properly rejected a further deferral because it did "not wish to adopt temporary solutions such as those that might only postpone these difficulties and further prolong uncertainty."<sup>45</sup> We agree with parties that urge the Commission to reject any attempts to extend further the suspension of payments.<sup>46</sup>

25. Although we will not grant the lengthy postponement requested by some parties, we will provide modest relief by extending the non-delinquency period for licensees that fail to meet the payment resumption deadline. In response to Urban Communicators' request, we will extend to 90 days the automatic 60-day non-delinquency period applicable to payments due on the payment resumption date.<sup>47</sup> As mentioned above, the Commission's rules allow a 90-day non-delinquency period for all other installment payments.<sup>48</sup> Although we stated in the *Second Report and Order* that a shorter non-delinquency period was justified in light of the one-year payment suspension,<sup>49</sup> we now believe that it is preferable to make the length of that non-delinquency period consistent with our rule for all other payments. We are providing this 30-day extension to assist licensees that are experiencing last-minute delays in raising capital. We believe that by offering this additional time, we will help these licensees complete their fund-raising efforts.

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construction deadline); OnQue Petition at 2 (supporting a two-year deferral from December 31, 1996); RFW Petition at 1, 4-5 (recommending a five-year deferral of principal and interest payments); Urban Communicators Petition at ii, 2, 5-7 (asking for an extension of the suspension until March 31, 1999, and two additional one-year deferrals, so long as licensees make certain demonstrations of financial ability and substantial construction progress and pay an interest rate increased by 0.5 percent for the deferral period); CONXUS Opposition at 6 (agreeing with NextWave and Alpine); Duluth PCS, et al. Opposition at 5 (advocating a five-year deferral of payment obligations); and Polycell Opposition at 5 (same as Duluth PCS, et al.). See also The Honorable Barbara Boxer *ex parte* filing at 1 (asking the Commission to consider a "limited deferral"); The Honorable Albert R. Wynn *ex parte* filing at 1 (requesting that the payment resumption date be extended by six months).

<sup>44</sup> *Second Report and Order*, 12 FCC Rcd at 16,446-47 para. 18.

<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., Antigone/Devco Opposition at 6 ("The public treasury is harmed by every deferral of payments."); AirGate Opposition at 10 ("as time elapses, the prospect for repayment diminishes"); Sprint Opposition at 5 ("further delay puts C block licensees at a competitive disadvantage, making attracting investment capital difficult; creates a cloud of uncertainty over the wireless sector; and unjustly enriches defaulting licensees by affording them financing opportunities not available to those who in good faith fulfilled their payment obligations"); Northcoast Opposition at 3-4 ("additional C Block installment payment rule changes would be bad policy because it would create uncertainty as to how the Commission will handle situations of licensee default that occur outside of the C Block context").

<sup>47</sup> Urban Communicators Petition at 7-8.

<sup>48</sup> 47 C.F.R. § 1.2110(f)(4)(i).

<sup>49</sup> *Second Report and Order*, 12 FCC Rcd at 16,449-50 para. 25.

26. Consistent with our rule for all other payments, payments made within this 90-day non-delinquency period will be assessed the 5 percent late payment fee that we recently adopted.<sup>50</sup> However, in light of the more than one-year suspension and this expanded non-delinquency period, we believe that a subsequent grace period is not warranted. Therefore, there will be no subsequent automatic grace period for licensees that fail to make payment within the 90-day non-delinquency period.<sup>51</sup> Subsequent payments, due after the initial resumption payment, will be subject to the rules adopted in the *Part I Third Report and Order*.

27. Under this plan, the Suspension Period (as defined in the *Second Report and Order*) will still end on March 31, 1998.<sup>52</sup> All interest accrued from the date of license grant through March 31, 1998, (i.e., Suspension Interest) will continue to be payable over eight equal payments. Interest accrued from April 1, 1998, through the payment resumption date will be due on the payment resumption date, in addition to one-eighth of the Suspension Interest. We believe that this plan will require licensees continuing under an installment payment plan, either through resumption or disaggregation, to demonstrate their financial viability by making a reasonable payment on the payment resumption date. This payment will evidence the ability of licensees to access the capital necessary to both service their government debt obligations and provide service to the public. In addition, we instruct the Bureau to modify the payment schedule so that all C and F block installment payments will be due on a quarterly basis, beginning on the payment resumption date.

28. We reject Urban Communicators' suggestion that Suspension Interest be forgiven, as well as its alternative proposals that Suspension Interest be paid either in a balloon at the end of the ten-year installment payment period or over six years in conjunction with other interest payments.<sup>53</sup> Because the Commission already has provided sufficient relief by granting the one-year suspension, we will neither forgive nor defer payment of the Suspension Interest. The Commission has accommodated licensees sufficiently by allowing payment of the Suspension Interest over eight equal payments.

29. We also reject requests from parties seeking a deviation from the payment schedule and from amounts established by the licensees' Notes.<sup>54</sup> We are providing all C block licensees with

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<sup>50</sup> See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, FCC 97-413 (released December 31, 1997) at para. 106 ("*Part I Third Report and Order*") (reconsideration pending). See 47 C.F.R. § 1.2110(f)(4)(i).

<sup>51</sup> See *Part I Third Report and Order* at para. 106; 47 C.F.R. § 1.2110(f)(4)(ii). But see The Honorable Albert R. Wynn *ex parte* filing at 1 (the Commission's newly adopted 180-day payment period should apply to C block licensees).

<sup>52</sup> See *Second Report and Order*, 12 FCC Rcd at 16,448 para. 21 (the Suspension Period was defined as "the period beginning with the date on which each license was conditionally granted through and including March 31, 1998").

<sup>53</sup> Urban Communicators Petition at 8-9.

<sup>54</sup> Alpine asks that: (1) principal and interest payments be spread over a period of 20 years; (2) principal and interest payments be paid annually, rather than quarterly; and (3) the accrual of interest be suspended from the date

an array of alternative payment options, designed to accommodate licensees' various needs. These options were developed and are now being modified in an effort to balance complex and competing interests, with the recognition that it is impossible to devise alternatives that satisfy every entity with an interest in this proceeding. The record before us does not provide a sufficient basis for creating additional payment choices; indeed, there is opposition to our doing so.<sup>55</sup> Moreover, as explained above and in the *Second Report and Order*, the Commission purposefully adopted an approach that does not significantly alter the amounts paid for individual licenses.<sup>56</sup> Retroactively changing the payment terms would be unfair to other applicants that might have bid differently under more relaxed payment terms.

30. Finally, we will not adopt the proposal made only by DiGiPH that the Commission somehow compensate those licensees that timely made the March 31, 1997, payment and, as a consequence, did not benefit from a suspension of that payment obligation.<sup>57</sup> Compensating licensees for complying with Commission rules would establish a precedent we consider inadvisable.<sup>58</sup> Furthermore, if a licensee opts to return all its licenses, we will refund any installment payments previously submitted for those licenses. If a licensee returns some licenses and retains others, the licensee will be allowed to apply previously submitted installment payments toward the prepayment

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of license grant until 90 days after the issuance of reauctioned licenses. Alpine Petition at 12-13, n.6; *see also* Alpine Reply at 8. Alpine also argues that licenses awarded in the original C block auction have diminished in value and, on that basis, urges the Commission to reduce the price for each "so affected" license by 15 percent per year until 90 days after the grant of reauctioned licenses. Alpine Petition at 13 n.6. DiGiPH similarly maintains that reauction will result in lower prices for licenses than at the original auction and therefore requests that the Commission reduce the debt of original licensees in an amount equal to the average reduction in cost for licenses sold at reauction. DiGiPH Petition at 8-11. Northern Michigan states that cash flow projections are not sufficient to support principal repayment over only four years and believes that beginning principal payments in year six is feasible if repayment occurs over 15 years. Northern Michigan Petition at 5-6. In addition, Northern Michigan and McBride seek relaxation of the construction requirements for C block licensees but fail to present convincing rationales for their proposals. *See* Northern Michigan Petition at 9; McBride Petition at 5.

<sup>55</sup> *See* AT&T Opposition at 3 ("Bidders in any Commission auction understand that there is no guarantee of business success even if they win a license. The Commission should not now create an expectation that it will shield applicants or licensees from the results of bad business decisions, or take actions that suggest that some licensees are 'too big to fail.' The menu of options the Commission provided in the *Order* will provide most C-block licensees with sufficient financial relief to permit them to continue to participate in the wireless marketplace, although it may be on a reduced basis."); *see also* PrimeCo Opposition at 4 ("[A] fundamental restructuring of the installment payment terms previously established and agreed to would contravene the Commission's established auction objective of awarding licenses to parties who value them the most and are the most likely to rapidly deploy service." [citation omitted]).

<sup>56</sup> *Second Report and Order*, 12 FCC Rcd at 16,438-39 para. 5.

<sup>57</sup> *See* DiGiPH Petition at 7-8.

<sup>58</sup> Moreover, the Commission has no explicit authority to pay interest to licensees, which was one of DiGiPH's suggestions. *Id.* at 8. For example, unsuccessful bidders in Commission auctions do not earn interest on their upfront payments or down payments. Rather, the accrued interest on these funds is transferred to the Telecommunications Development Fund. *See* Communications Act § 309(j)(8)(C), 47 U.S.C. § 309(j)(8)(C); 47 C.F.R. §§ 1.2106(a) and 1.2107(b).

of retained licenses or toward the Suspension Interest for retained licenses which the licensee does not prepay. For example, if a licensee elects resumption of payments for an MTA, any installment payments previously submitted for a BTA license within that MTA will be applied toward the Suspension Interest owed for that license, as described in the *Second Report and Order*.<sup>59</sup> The treatment of installment payments with respect to the disaggregation and prepayment options is specified below. Therefore, because installment payments will either be refunded or credited, we believe additional compensation is unnecessary.

## VI. SURRENDER OF LICENSES FOR REAUTION (AMNESTY)

### A. Background

31. In the *Second Report and Order*, the Commission adopted an amnesty option under which a C block licensee would be permitted to surrender all of its licenses in exchange for relief from its outstanding debt.<sup>60</sup> The Commission would waive any applicable default payments, subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards.<sup>61</sup> Licensees electing this option would not have their down payments returned; however, neither would they be deemed in default or delinquent in meeting government debt obligations.<sup>62</sup> In addition, they would be eligible to bid for any and all licenses in the reaution<sup>63</sup> and would not be restricted in making post-auction acquisitions.<sup>64</sup>

32. Subject to one exception, licensees availing themselves of the amnesty option would be required to surrender all of their licenses to the Commission.<sup>65</sup> The sole exception to this "all-or-nothing" rule allowed licensees that met or exceeded the five-year build-out requirement on September 25, 1997, the date of adoption of the *Second Report and Order*, to keep licenses for built-out markets.<sup>66</sup> Specifically, a licensee utilizing this exception would be allowed to retain any built-out BTA, on the condition that it also keep any additional BTAs in the MTA where the built-out BTA is located and that it pay for all of those retained licenses under the terms of their original notes.<sup>67</sup>

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<sup>59</sup> *Second Report and Order*, 12 FCC Rcd at 16,451 n.54 para. 27.

<sup>60</sup> *Second Report and Order*, 12 FCC Rcd at 16,462-64 paras. 53-58.

<sup>61</sup> *Id.*, 12 FCC Rcd at 16,462 para. 53. *See also* 4 C.F.R. Parts 101-105.

<sup>62</sup> *Second Report and Order*, 12 FCC Rcd at 16,462-63 para. 55.

<sup>63</sup> *Id.*, 12 FCC Rcd at 16,462 para. 54.

<sup>64</sup> *Id.*, 12 FCC Rcd at 16,439-40 para. 6.

<sup>65</sup> *Id.*, 12 FCC Rcd at 16,463 para. 56.

<sup>66</sup> *Id.*, 12 FCC Rcd at 16,463-64 para. 57.

<sup>67</sup> *Id.*

33. The Commission noted in the *Second Report and Order* that, although the Bureau had suspended installment payments on C block licenses on March 31, 1997, some licensees had made installment payments after the suspension.<sup>68</sup> In addition, some licensees had made their regularly scheduled installment payments prior to the suspension.<sup>69</sup> The Commission directed the Bureau to refund any installment payments made (whether due on or before March 31, 1997) on any license surrendered under the amnesty option and announced that it would forgive payment of any due, but unpaid, installment payments for any surrendered license.<sup>70</sup> Licensees retaining licenses under the build-out exception were to pay over eight equal payments (beginning with the payment due on March 31, 1998) all Suspension Interest applicable to the retained licenses. All installment payments previously made by the licensee on any of its licenses would be applied to reduce the Suspension Interest applicable to the retained licenses, and any amounts remaining would be refunded.<sup>71</sup>

## B. Discussion

34. In keeping with our decision on reconsideration to allow licensees to make elections on an MTA-by-MTA basis, we modify the amnesty option to permit licensees to select that option for as many of their MTAs as they choose. Because amnesty no longer requires an "all-or-nothing" choice, we also eliminate as moot the build-out exception.<sup>72</sup> Our decision is consistent with DiGiPH's recommendation that licensees be permitted "to return licenses for all BTAs on a per MTA basis, separate and apart from having met the five-year build out provisions . . ."<sup>73</sup> The change also satisfies Alpine's request that licensees be entitled to turn in any or all of their licenses under amnesty.<sup>74</sup>

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<sup>68</sup> *Id.*, 12 FCC Rcd at 16,464 para. 58. Some of these payments were installments due on March 31, 1997; others were amounts due on December 31, 1996, but not paid until March 31, 1997, based on the Commission's automatic 90-day non-delinquency rule. *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> NextWave's request that the Commission "clarify" that the build-out exception encompasses all licensees that "invested significantly" in network build-out activities is now moot. *See* NextWave Petition at 17. *See also* Airtel Petition at 1; Christensen Petition at 1; CVI Wireless Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; URS Greiner Petition at 1; Dorne & Margolin *ex parte* filing at 1. Also moot is Omnipoint's suggestion that we allow licensees to disaggregate licenses retained under the build-out exception. *See* Omnipoint Petition at 5-6; Omnipoint Reply at 1-2. Permitting licensees to make elections on an MTA-by-MTA basis eliminates any need for Omnipoint's proposal because licensees are free to disaggregate licenses in any built-out MTAs they wish to retain.

<sup>73</sup> DiGiPH Petition at 4-7. DiGiPH offered this recommendation as an alternative to its suggestion that the Commission extend the date by which licensees would have to have met the five-year build-out requirement for the build-out exception. *Id.* *See also* NextWave Reply at 8.

<sup>74</sup> Alpine Petition at 9-10.

35. The Commission originally adopted the "all-or-nothing" requirement for the amnesty option in order to prevent licensees from "cherry-picking" only the most desirable MTAs.<sup>75</sup> The Commission believed that facilitating a "cherry-picking" scheme would limit the potential for licenses to be aggregated, which would decrease their value to bidders in the reauction.<sup>76</sup> On reconsideration, we find persuasive DiGiPH's contention that requiring licensees to keep or surrender entire MTAs, rather than BTAs, will sufficiently limit "cherry-picking."<sup>77</sup> We also agree with DiGiPH's position that applying the amnesty option on an MTA-by-MTA basis does not carry a risk of "cherry-picking" significantly different from that connected with the original disaggregation option.<sup>78</sup>

36. Several parties object to the fact that a licensee does not receive any refund of its down payment under the amnesty option.<sup>79</sup> As the Commission explained in the *Second Report and Order*, its intent in retaining the down payment was to ensure that licensees electing the amnesty option and participating in the reauction of their surrendered licenses do so without the undue advantage of having all of their original funds available to repurchase the same spectrum they surrendered.<sup>80</sup> The Commission further explained that licensees selecting amnesty would benefit substantially by avoiding being declared in default and thereby being freed from assessments of delinquencies and other collection costs associated with default payments.<sup>81</sup> The rationale of the *Second Report and Order* continues to be valid. If we were to allow C block licensees to return their licenses, receive a refund of their down payments, and participate in the reauction, we would undermine the integrity of the auction process by placing amnesty licensees in virtually the same position they would have occupied had the initial C block auction never taken place.

37. Nevertheless, we recognize that because all elections now are being applied on an MTA-by-MTA basis, licensees are permitted to return licenses in certain MTAs and retain licenses in other MTAs, as with the prepayment option under the *Second Report and Order*. Thus, licensees

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<sup>75</sup> *Second Report and Order*, 12 FCC Rcd at 16,463 para. 56.

<sup>76</sup> *See id.*, 12 FCC Rcd at 16,469 para. 67.

<sup>77</sup> DiGiPH Petition at 4-5.

<sup>78</sup> *Id.* *See also* NextWave Reply at 8 ("[T]he Commission should allow licensees to select options on an MTA basis. Establishing an MTA rule across the board eliminates any concern that permitting flexible selection of options would result in cherry picking.").

<sup>79</sup> *See* Alpine Petition at 9-10; Hyundai Petition at 6 (contending that "forfeiture of up to 100 percent of a down payment does not appear rationally related to any harm"); Hyundai Reply at 4-7; McBride Petition at 2, 4 (claiming that the amnesty option is punitive in nature and requesting "100 percent return of all down payments, plus all the interest payments"). *See also* AmeriCall Opposition at 5-7 ("fairness and equity require at least that the forfeiture in an amnesty or disaggregation election be no greater than the forfeiture by a licensee electing prepayment . . .").

<sup>80</sup> *Second Report and Order*, 12 FCC Rcd at 16,462-63 para. 55.

<sup>81</sup> *Id.*; *see also* 47 C.F.R. § 1.2110(f)(4)(iii), (iv). We note that both AmeriCall and Omnipoint ask that we establish specific timing goals for providing refunds to licensees electing the amnesty option. AmeriCall Petition at 3; Omnipoint Opposition at 14. The Bureau will address this issue in a forthcoming public notice on procedures.

electing the amnesty option have the following choice. For licenses in each MTA returned under the amnesty option, the licensee may choose either to: (1) receive no credit for its down payment(s) but remain eligible to bid in the re-auction on all its licenses in the returned MTA (pure amnesty), or (2) obtain credit for 70 percent of its down payment and forgo for a period of two years from the start date of the re-auction eligibility to reacquire the licenses it surrendered pursuant to this option through either re-auction or any other secondary market transaction (amnesty/prepayment).<sup>82</sup> For purposes of this two-year eligibility restriction, a licensee includes qualifying members of the licensee's control group and their affiliates.<sup>83</sup> The 70 percent credit must be applied toward prepayment of the entire principal owed for a retained MTA with 30 MHz licenses and/or toward prepayment of the entire principal owed for the retained 15 MHz licenses of an MTA that has been disaggregated. Providing an additional choice within the amnesty option substantially increases the level of flexibility available to licensees and enables them to formulate new business plans that may be more attractive to lenders and investors. It also reflects a suggestion made by Alpine that licensees not participating in the C block re-auction lose a substantially smaller portion of their down payment than that lost by licensees that do participate.<sup>84</sup>

## VII. PREPAYMENT

### A. Background

38. In the *Second Report and Order*, the Commission offered C block licensees the option to prepay the outstanding principal debt obligations for any licenses, on an MTA basis, that they elected to retain, subject to the restriction described below. The remaining licenses were required to be surrendered to the Commission for re-auction.<sup>85</sup> In exchange, the Commission would forgive the debt on the surrendered licenses, and any associated payments owed.<sup>86</sup> A licensee electing this option would make its prepayment by using 70 percent of the total of all down payments made on the licenses it surrendered to the Commission, plus 100 percent of any installment payments previously paid for all licenses (collectively, "Available Down Payments"),<sup>87</sup> plus any "new money" it was able

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<sup>82</sup> As mentioned above, if a licensee opts to return all its licenses, we will refund any installment payments previously submitted for those licenses.

<sup>83</sup> See Section X.B.2. below for the definition of "affiliate."

<sup>84</sup> See Alpine Petition at 9-10 ("[W]ith respect to the amnesty option, the Commission should revise the requirement for the forfeiture of down payments so that licensees have some incentive to accept this option. For those entities *not* participating in the re-auction, a substantially lesser penalty, keyed at most to the estimated cost incurred in re-auctioning the spectrum, would be a more appropriate means of insuring the integrity of the Commission's auction processes than total loss of the down payment. As to those entities who would desire to bid on such spectrum in the re-auction, a penalty of at most 30 percent of the previously made down payment would be appropriate.").

<sup>85</sup> *Second Report and Order*, 12 FCC Rcd at 16,467-70 paras. 64-69.

<sup>86</sup> *Id.*, 12 FCC Rcd at 16,467 para. 64.

<sup>87</sup> We clarify that the term "Available Down Payments," as used in paragraph 64 of the *Second Report and Order*, was intended to include both 70 percent of the down payment made on surrendered licenses and any installment

to raise.<sup>88</sup> The remaining portion of the down payment applicable to the surrendered licenses would not be refunded or credited but simply would be retained by the Commission.<sup>89</sup> Licensees would be prohibited from bidding on their returned spectrum in the reauction or from reacquiring it in the secondary market for two years from the start of the reauction. Licensees could, however, bid on spectrum or licenses surrendered by other licensees, provided such licensees were not affiliates.

39. The requirement that a licensee had to prepay all its BTA licenses within those MTAs that it selected for prepayment prevented "cherry-picking" because licensees could not prepay only the most desirable BTA licenses within a given MTA and then surrender the rest.<sup>90</sup> The one exception to this rule was that any licensee lacking sufficient funds to prepay every BTA license within a chosen MTA would be permitted to prepay only those BTA licenses within that MTA that it could afford.<sup>91</sup> The licenses for the remaining BTAs within that MTA which the licensee could not afford to prepay would be surrendered to the Commission.

## B. Discussion

40. By providing a license free and clear of debt and payment conditions, prepayment makes it easier for licensees to raise the additional capital necessary to build out their systems and deploy new services. Thus, consumers benefit by receiving service sooner. Prepayment also removes the Commission from the role of lender, which sometimes may conflict with its responsibilities as a regulator.<sup>92</sup> In addition, prepayment benefits the public because it assures taxpayers of full payment of licenses. Indeed, we have implicitly expressed our preference for prepayment by eliminating installment payments as a means of financing small business participation for the immediate future.<sup>93</sup>

41. Under our modified approach, the prepayment option remains essentially the same as set forth in the *Second Report and Order*. For any 30 MHz licenses that are returned to the Commission, the licensee may continue to apply 70 percent of the down payment made on those licenses toward the prepayment of the entire outstanding principal owed in retained MTAs. The licensee may pool any down payment amounts that have been designated for prepayment, plus

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payments previously submitted for those licenses. *Id.*

<sup>88</sup> *Id.* Since the *Second Report and Order* established that interest already paid is to be wholly credited toward prepayment under this option, Urban Communicators' request to that effect is moot. Urban Communicators Petition at 10.

<sup>89</sup> *Second Report and Order*, 12 FCC Rcd at 16,467 para. 64.

<sup>90</sup> *Id.*, 12 FCC Rcd at 16,469 para. 67.

<sup>91</sup> *Id.*

<sup>92</sup> See FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, *Report*, FCC 97-353 (released October 9, 1997) at 39-40.

<sup>93</sup> *Part 1 Third Report and Order* at paras. 38-40.

installment payments previously paid on any returned licenses.<sup>94</sup> We will refer to this pool of credit as a licensee's "Prepayment Credit."<sup>95</sup> This Prepayment Credit may be used to prepay any retained MTAs with 30 MHz licenses. As will be discussed in more detail below, it also may be used to prepay the retained 15 MHz licenses of any MTAs that have been disaggregated.

42. As under the *Second Report and Order*, any "new money" that is used to make prepayment must be submitted on or before the election date. Unlike under the *Second Report and Order*,<sup>96</sup> affiliated licensees will be allowed to combine their Prepayment Credits.<sup>97</sup> However, any affiliated licensees that choose to pool their Prepayment Credits will be considered one licensee for purposes of making elections. Therefore, the elections made by those affiliates must be made in concert and must be made on an MTA-by-MTA basis, as is required of individual licensees.<sup>98</sup> Credit pooling does not require the participation of all of a licensee's affiliates. Any affiliate that chooses not to pool its credit along with its other affiliates will be considered an individual licensee for purposes of making elections. We believe on reconsideration that allowing this flexibility is consistent with the fact that, for purposes of the reauction, we consider a licensee and its affiliates to be the same entity. It also will prevent licensees from being disadvantaged if, without such a rule, they would have been precluded from electing prepayment by virtue of the fact that they transferred BTA licenses to affiliates.

43. In response to a request from DiGiPH, we make one important clarification. DiGiPH argues that, because affordability is a concept subject to differing interpretations, the Commission should further define its requirement that a licensee must prepay all of those BTA licenses within the MTA "that it can afford."<sup>99</sup> We clarify that, for purposes of this exception, a licensee can "afford" to prepay all of its BTA licenses within that MTA if it can prepay all BTA licenses using only its Prepayment Credit. If this amount is not enough to prepay all its BTA licenses within an MTA, the licensee must prepay as many BTA licenses in the MTA as this amount will allow and must surrender

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<sup>94</sup> As described below, down payment amounts may also come from disaggregated licenses if the licensee uses the credit for prepayment. The treatment of installment payments previously submitted for disaggregated licenses is also described below.

<sup>95</sup> The term "Prepayment Credit" is essentially a substitution for the term "Available Down Payments," updated to account for the additional flexibility provided under our modified approach.

<sup>96</sup> *Second Report and Order*, 12 FCC Rcd 16,467 n.144 para. 64.

<sup>97</sup> See Section X.B.2. below for the definition of "affiliate."

<sup>98</sup> Therefore, if affiliated licensees decide to pool their credits, then all BTA licenses held by any of those affiliates must be surrendered for credit in any MTA where one of their BTA licenses is surrendered for credit. Similarly, those affiliated licensees must collectively select MTAs for prepayment, and all BTA licenses held by any of those affiliates in those selected MTAs must be prepaid, subject to the affordability exception. Likewise, if those affiliated licensees choose to disaggregate an MTA, then all BTA licenses held by any of those affiliates in that MTA must be disaggregated, and so on.

<sup>99</sup> DiGiPH Petition at 11-12.

for reauction the remaining BTA licenses that it cannot afford to prepay.<sup>100</sup> Only under these circumstances may a licensee choose, within the given MTA, which BTA licenses to prepay and which to surrender. Once a licensee adds any "new money" at all to make prepayment, the affordability exception does not apply, and the licensee must add sufficient "new money" that, when added to its Prepayment Credit, is adequate to prepay all its BTA licenses within its chosen MTAs. A licensee claiming the affordability exception may choose only one MTA in which it will apply, and it must prepay all its BTA licenses within all other MTAs selected for prepayment. The Commission will not refund any unspent portion of the Prepayment Credit.<sup>101</sup> We believe retaining any unspent portion of the Prepayment Credit is a reasonable price for relieving the requirement that all BTA licenses in all MTAs be prepaid. The affordability exception also will apply to disaggregated MTAs that the licensee wishes to prepay.

44. This clarification provides an objective means for licensees to implement the affordability exception. It eliminates any doubt or confusion regarding the scope of the term "afford," and it is an easy, bright-line test to administer. In addition, we believe the restrictions we impose on the affordability exception minimize a licensee's ability to "cherry-pick" among BTAs. Therefore, we reject Omnipoint's request that the Commission eliminate the affordability exception, or in the alternative, grant all licensees unlimited flexibility under all options to select which BTA licenses to retain and which to surrender.<sup>102</sup>

45. We reject arguments claiming that the prepayment option should be revised or eliminated because it benefits only certain licensees.<sup>103</sup> Each of the payment relief options presented

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<sup>100</sup> *But see* ClearComm *ex parte* filing at 1 (urging the Commission to allow licensees to prepay one or more BTA licenses in an MTA while retaining, and resuming payments on, the remaining BTA licenses in the MTA).

<sup>101</sup> For example, assume a licensee owns 30 licenses held in 3 MTAs as follows: 2 licenses in MTA #1, 12 licenses in MTA #2, and 16 licenses in MTA #3; that each license cost \$100,000; that the licensee made a down payment of \$10,000 on each license leaving \$90,000 as the debt on each license; and that the licensee made no installment payments. If the licensee chooses to prepay the licenses in MTA #1, its Prepayment Credit will be \$196,000 (28 x \$10,000 down payment for each license not being prepaid x 70 percent). Utilizing its Prepayment Credit of \$196,000, the licensee can "afford" to prepay all of its licenses in MTA #1. The unspent portion of its Prepayment Credit [\$196,000 less (2 x \$90,000) = \$16,000] will be retained by the Commission.

If instead the licensee decided to prepay licenses in MTA #3, it can only "afford" to prepay 2 of those 16 licenses calculated as follows: 2 x \$90,000 = \$180,000 needed to prepay; Prepayment Credit is calculated as follows: 28 x \$10,000 x 70 percent = \$196,000. The licensee may elect which 2 licenses to prepay and must surrender the remaining 14 licenses. The Commission will retain the unspent portion of the Prepayment Credit, which is \$16,000 [\$196,000 less (2 x \$90,000) = \$16,000]. If, however, the licensee elects to add "new money" to its Prepayment Credit, it *must* add enough "new money" to the Prepayment Credit to prepay the remaining 14 licenses in MTA #3 (i.e., 14 x \$90,000 less \$16,000 = \$1,244,000 of "new money" needed). The licensee may not add only \$74,000 of "new money" and prepay a third license while surrendering the remaining 13 unprepaid licenses.

<sup>102</sup> Omnipoint Opposition at 9; Omnipoint Reply at 2.

<sup>103</sup> *See* McBride Petition at 2-3 (the prepayment option favors large bidders that have multiple licenses from which to choose, whereas small bidders seeking to keep licenses with payment relief are forced to disaggregate);

to C block licensees is designed to strike a fair balance of competing interests, with benefits and obligations appropriate to varying circumstances. Although these options are intended to provide distinct choices for licensees, they adhere to a consistent set of principles. Moreover, the available choices complement each other to provide a range of alternatives to the various C block licensees experiencing financial difficulties. Because it is an important component in this package of options and because we continue to believe it is sound as a matter of policy, we decline to eliminate the prepayment option. A menu of options is provided because no single solution would be appropriate for every situation; therefore, eliminating any one option would prejudice those licensees for which it may be best suited.

46. We note that we received numerous requests to allow licensees to use their entire down payment under the prepayment option.<sup>104</sup> We will maintain our rule that licensees electing the prepayment option will receive no refund or credit for 30 percent of the down payment made on 30 MHz licenses they surrender to the Commission. We believe that retention of this portion of the down payment is necessary to preserve the integrity of the auction process.<sup>105</sup> Furthermore, to return the entire down payment would undermine the purpose of the down payment -- to help ensure performance on a licensee's debt obligation.<sup>106</sup> We disagree with parties that characterize retention of a portion of the down payment as punitive,<sup>107</sup> a penalty,<sup>108</sup> or a forfeiture.<sup>109</sup> We view 30 percent

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Central Oregon Petition at 6 (single licensees get no benefit from the buy-out option); Omnipoint Reply at 2 (the prepayment option should be eliminated because "it amounts to nothing other than an opportunity for a handful of the largest bidders to 'cherry-pick' licenses").

<sup>104</sup> See Airtel Petition at 1; Alpine Petition at 10; Cellexis Petition at 6; Cellnet Petition at 2; Christensen Petition at 1; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; Meretel Petition at 3; MFRI Petition at 4; New Wave Petition at 1; NextWave Petition at 10-15; OnQue Petition at 2; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 5; UCNI Petition at 2; Urban Communicators Petition at 10; URS Greiner Petition at 1; Wireless Nation Petition at 2; Duluth PCS, et al. Opposition at 5-8; Polycell Opposition at 5-8; Third Kentucky Opposition at 2; CX Systems *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1. See also Hyundai Petition at 4-7; Christensen *ex parte* filing at 1; Florida Power *ex parte* filing at 1; Kabbara *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1; MRFI Reply at 1; Wireless Ventures Reply at 3.

<sup>105</sup> See Communications Act § 309(j), 47 U.S.C. § 309(j).

<sup>106</sup> See Communications Act § 309(j)(4)(B), 47 U.S.C. § 309(j)(4)(B); In the Matter of BDPCS, Inc., *Order*, 12 FCC Rcd 6606 (WTB 1997), *application for review pending*.

<sup>107</sup> See, e.g., Alpine Petition at 8; RFW Petition at 5; MFRI Petition at 4.

<sup>108</sup> See, e.g., NextWave Petition at 10-15; Duluth PCS, et al. Opposition at 5-6; Polycell Opposition at 5-6.

<sup>109</sup> See, e.g., AmeriCall Opposition at 5-7; Hyundai Reply at 4-6.

of the down payment as the fair and reasonable price for receiving the benefits of this option.<sup>110</sup> We also note that AirGate correctly characterizes the prepayment option as a method of providing licensees with more flexibility in using their down payments than is permitted under current rules.<sup>111</sup>

47. We disagree with NextWave, Cellexis, and other parties that the Commission should account for the net present value of forgoing installment payments,<sup>112</sup> or otherwise discount the principal amount due under the installment payment plan.<sup>113</sup> As Sprint points out, the Commission has considered this argument extensively and properly rejected it.<sup>114</sup> In the *Second Report and Order*, the Commission stated that a licensee should be required to pay the face value of its auction bid.<sup>115</sup> Accounting for the net present value of forgoing installment payments would rewrite the auction

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<sup>110</sup> Several parties asking the Commission to reject petitioners' request to use the entire down payment under the prepayment option reiterate the Commission's discussion on this matter in the *Second Report and Order*. See Sprint Opposition at 4-5 (arguing that giving full credit would be unfair to unsuccessful bidders and to licensees that resume payments under their existing obligations); Antigone/Devco Opposition at 3-5 (asking the Commission to retain 30 percent of the down payment to preserve the integrity of the auction process). Although Omnipoint recognizes that retaining the 30 percent down payment on surrendered licenses is not punitive, we disagree with its reasoning that it accounts for reauction costs to the government. See Omnipoint Opposition at 3-5.

<sup>111</sup> AirGate Opposition at 13. AirGate notes that it would support "a limited exception" to permit licensees that elect to prepay all of their C block licenses to use all of their down payment toward the cash purchase price. *Id.* at 13 n.22. No such exception is necessary, given that AirGate's scenario is no different from paying off the entire installment debt early.

<sup>112</sup> See NextWave Reply at 8-9 (net present value accurately presents the size of PCS debt in light of the licensee's higher cost of capital compared to the government rate of interest); Cellexis Reply at 6 (by charging nominal value rather than net present value, the Commission is raising the effective price of the license). See also Airtel Petition at 1; Alpine Petition at 10; Cellexis Petition at 6-7; Cellnet Petition at 2; Central Oregon Petition at 4-6; Christensen Petition at 1; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; MFRI Petition at 4-5; New Wave Petition at 1; NextWave Petition at 5-10; Northern Michigan Petition at 7; OnQue Petition at 2; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 6; URS Greiner Petition at 1; UCNI Petition at 2; Urban Communicators Petition at 10; Wireless Nation Petition at 2; Meretel Petition at 2; Polycell Opposition at 9; Duluth PCS, et al. Opposition at 9; Third Kentucky Opposition at 2; Christensen *ex parte* filing at 1; CX Systems *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1; Florida Power *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1; Wireless Ventures Reply at 3.

<sup>113</sup> Compare Alpine Petition at 10 (a 59 percent discount from the face amount of the note would account for the present value of the Commission's financing) with NextWave Petition at 5-10 (arguing for a discount rate of at least 15 percent) and Third Kentucky Opposition at 2 (same as NextWave). See also Meretel Petition at 2 (prepayment is not a viable option unless the prepaid amount is equal to or below that of the price paid for A and B block licenses).

<sup>114</sup> Sprint Opposition at 4.

<sup>115</sup> *Second Report and Order*, 12 FCC Rcd at 16,468 para. 66. See also *id.*, Separate Statement of Susan Ness, 12 FCC Rcd at 16,511 ("In my view, the price bid is the price bid. Bidders were not offered a cash versus credit price.").

results because it would have the effect of changing the amounts bid for licenses.<sup>116</sup> Therefore, to do so would be unfair to those bidders that withdrew from the auction under the assumption that the winning bid amounts represented the prices that would be paid for the licenses.<sup>117</sup> Because we continue to support the policy that auction bids should be paid at their face value, we will not discount the principal due.<sup>118</sup> Although the Commission provides favorable terms for financing the bid price, the cost of an installment payment plan is the interest that accrues over time. The benefit to a licensee for early pay-off of its financial obligations is the savings in the amount of interest that otherwise would be owed.<sup>119</sup> We believe this trade-off provides a further reason for not discounting the principal.

48. We decline to provide further flexibility under the prepayment option. Cellexis requests that the Commission grant the five-year build-out exception provided under the amnesty option to licensees choosing the prepayment option.<sup>120</sup> A build-out exception is not needed because, under our modified approach, licensees are permitted to retain any MTAs they wish, whether built-out or not. Regardless, even under the approach adopted in the *Second Report and Order*, a build-out exception was unnecessary because licensees had the discretion to choose which MTAs to prepay and which to surrender, as opposed to the "all-or-nothing" approach under the original amnesty option.<sup>121</sup> In addition, we decline MFRI's request to allow a licensee that holds both C and F block licenses to use its C block down payment to purchase for cash its F block licenses.<sup>122</sup> We do not believe such flexibility is warranted because the reduction of debt associated with prepayment will help those licensees address their capital needs in servicing their F block debt. Finally, Urban Communicators argues that the requirement that prepaying licensees must purchase all BTA licenses

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<sup>116</sup> See AirGate Opposition at 7-9 (a reduction in bid amounts would translate into a rewrite of the auction results).

<sup>117</sup> See Omnipoint Opposition at 6-7 (a net present value discount would be fundamentally unfair to other bidders in the auction that properly relied on the Commission's rule that high bidders must pay the entire nominal amount of their bids or their licenses automatically cancel).

<sup>118</sup> Moreover, if we were to discount the debt at a licensee's cost of capital it would be impossible to determine accurately a cost of capital for all licensees. The cost of capital varies for each licensee because it is based on a licensee's individual cost of debt and equity and on the ratio of debt to equity. Therefore, no single discount rate would be appropriate for every licensee. See Omnipoint Opposition at 6-8 (a net present value discount "would be impossible to implement in a manner that is fair and avoids unjust enrichment, because all parties -- including each Block C licensee and the U.S. Government -- have separate costs of capital").

<sup>119</sup> See ALLTEL Opposition at 2-4; Northcoast Opposition at 5; Antigone/Devco Opposition at 2; Fidelity Capital Opposition at 3-4.

<sup>120</sup> Cellexis Petition at 6.

<sup>121</sup> See *Second Report and Order*, 12 FCC Rcd at 16,469 para. 68.

<sup>122</sup> MFRI Petition at 5.

held within an MTA is unfair to licensees that have licenses in only one MTA.<sup>123</sup> We disagree. This restriction is essential to prevent "cherry-picking," and a licensee that cannot avail itself of this option can either choose another option or limit its purchases under the affordability exception, if applicable.

## VIII. DISAGGREGATION OF SPECTRUM FOR REACTION

### A. Background

49. In the *Second Report and Order*, the Commission offered C block licensees the option to disaggregate a portion of their spectrum and return it to the Commission for reaction.<sup>124</sup> Licensees electing the disaggregation option would return one-half (i.e., 15 MHz of 30 MHz) of their spectrum from each of their BTA licenses within the MTAs in which they chose to disaggregate spectrum.<sup>125</sup> In other words, licensees would not be required to disaggregate spectrum for all of the licenses they hold, but they would have to disaggregate spectrum for all of the licenses they hold in a given MTA if they disaggregated spectrum for one license in that MTA. The returned spectrum would have to be at 1895 - 1902.5 MHz paired with 1975 - 1982.5 MHz, which is spectrum contiguous to the F block.<sup>126</sup>

50. In exchange, the Commission would reduce by 50 percent the amount of debt that was owed on a 30 MHz license before it was disaggregated.<sup>127</sup> Fifty percent of the down payment made on the 30 MHz license would be considered the down payment for the retained 15 MHz of spectrum, but the Commission would not provide a refund or credit for the remaining 50 percent of the down payment.<sup>128</sup> Licensees were required to repay over eight equal payments (beginning with the payment due on March 31, 1998) all Suspension Interest, adjusted to reflect the reduction in debt obligation.<sup>129</sup> Any installment payments that were paid prior to the suspension would be credited in full against those amounts.<sup>130</sup> Licensees were prohibited from bidding on their returned spectrum in the reaction or from reacquiring it in the secondary market for two years from the start of the reaction.<sup>131</sup>

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<sup>123</sup> Urban Communicators Petition at 10. *But see* AirGate Opposition at 14-15 (licensees should not be permitted to return licenses on a BTA-by-BTA basis).

<sup>124</sup> *Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*, 12 FCC Rcd at 16,456 para. 39.

<sup>127</sup> *Id.*, 12 FCC Rcd at 16,456 para. 40.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*, 12 FCC Rcd at 16,457 para. 42.

Licensees could, however, bid on spectrum or licenses surrendered by other licensees, provided such licensees were not affiliates.<sup>132</sup>

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<sup>132</sup> *Id.*

## B. Discussion

51. As provided under the *Second Report and Order*, when a licensee disaggregates an MTA, it will receive full credit for the portion of the down payment applicable to the spectrum retained from a license (i.e., 50 percent of the down payment made on the original 30 MHz license). However, on reconsideration, we modify our decision that licensees electing the disaggregation option receive no refund or credit for the portion of the down payment applicable to the returned spectrum. For each disaggregated license for which the licensee elects to resume installment payments, rather than prepay, we will provide a credit of 40 percent of the down payment applicable to the 15 MHz of spectrum that is returned to the Commission. The 40 percent credit may only be used to reduce the amount owed on the 15 MHz of spectrum retained from the same BTA license that generated the credit. The credit, at the licensee's option, may be applied either to Suspension Interest and/or to reduce the principal outstanding.<sup>133</sup> Any installment payments previously submitted for a disaggregated license for which the licensee elects to resume installment payments will be credited as described in the *Second Report and Order* (i.e., toward Suspension Interest).<sup>134</sup>

52. We derived the 40 percent credit because when it is combined with the 100 percent credit associated with the retained spectrum, the licensee will receive a credit of 70 percent of the total down payment for the original 30 MHz license. We have decided to allow this additional credit because we are persuaded by the argument of several parties that the credit permitted under the disaggregation option should be consistent with the 70 percent credit permitted under the prepayment option.<sup>135</sup> We believe the disparity that existed under the *Second Report and Order* was unfair to licensees that were precluded from electing prepayment. Furthermore, allowing this additional credit will advance the purposes of the disaggregation option. Disaggregation benefits both licensees and consumers because it provides a means for licensees to remain in a market area at a significantly reduced cost. By having their outstanding debt decreased by 50 percent, licensees improve their ability to finance their retained spectrum and build out their networks. In addition, disaggregation is pro-competitive because it provides a means for other competitors to enter a market area. It also gives unsuccessful bidders an opportunity to rebid on spectrum in market areas in which they were initially outbid. We believe the additional 40 percent credit will promote these benefits of

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<sup>133</sup> See The Honorable Albert R. Wynn *ex parte* filing at 1-2 (licensees electing disaggregation should be allowed "to apply their excess down payments and interest payments they have made to their upcoming installment payments, thereby providing them, in exchange for actual money already paid to the U.S. Government, a brief extension of time to complete their financing").

<sup>134</sup> *Second Report and Order*, 12 FCC Rcd at 16,456 para. 40.

<sup>135</sup> Omnipoint Petition at 8-9; McBride Petition at 1-2; AmeriCall Opposition at 6. See also ClearComm Petition at 18-21 (if the Commission refuses to allow licensees full use of their down payments, then licensees electing disaggregation should at least not be subject to a greater penalty than those electing prepayment). *But see* AirGate Opposition at 12 (the Commission's decision to retain 50 percent of the down payment is reasonable).

As discussed above, a licensee that selects the amnesty option and chooses to bid on its returned licenses in the reauction will not receive credit for any of its down payment made on its returned licenses. We believe a licensee's opportunity to bid on its returned licenses is equitable compensation for not receiving any down payment credit.

disaggregation and will help licensees that have expressed an interest in disaggregation to take advantage of this option and continue their plans to provide service in their license areas.

53. We believe a 40 percent credit is warranted when a licensee resumes installment payments on a disaggregated MTA because the licensee remains in the MTA and continues building out its network in order to serve those consumers. We will not provide such a 40 percent credit to licensees that resume installment payments on a license in a different MTA. In contrast to a licensee that uses the 40 percent credit to resume installments on the retained portion of the disaggregated license, a licensee that seeks to apply a 40 percent credit from down payments made on licenses returned under an amnesty election would have, under those circumstances, abandoned service to the entire licensed area affected by that election. We believe that licensees that surrender licenses should not receive a credit for abandoning those markets unless they use the credit to prepay retained licenses.

54. We also revise the approach adopted in the *Second Report and Order* to provide for a combination of disaggregation and prepayment. As we have discussed, there are many advantages to both prepayment and disaggregation, and we believe a combination of the two should be encouraged because it offers the benefits of both options. For example, the licensee continues to build out its network in the market area, the Commission is relieved from its position of lender, and competing entities have the opportunity to bid on the returned spectrum. Therefore, if a licensee disaggregates an MTA and prepays the outstanding principal owed on the retained portion of the MTA, we will provide the licensee with a higher percentage of credit as an incentive to choose both disaggregation and prepayment. Instead of a 40 percent credit, a licensee that elects both disaggregation and prepayment will receive credit for 70 percent of the down payment applicable to the returned spectrum.<sup>136</sup> This 70 percent credit will be added to the licensee's Prepayment Credit which, as explained above, may be used to prepay any retained MTAs with 30 MHz licenses and/or the retained portions of any MTAs that have been disaggregated. Allowing this 70 percent credit is consistent with our policy of providing a 70 percent credit for 30 MHz licenses that are returned to the Commission. In both cases, the credit is 70 percent of the down payment associated with the amount of spectrum that is returned. In addition, any installment payments previously submitted for the licenses in an MTA that is both disaggregated and prepaid will be added to the licensee's Prepayment Credit.

55. If a licensee elects both disaggregation and prepayment for an MTA, the licensee must prepay the principal owed on the 15 MHz of spectrum retained from each BTA license in the MTA. However, if a licensee's Prepayment Credit is insufficient to make full prepayment on the entire MTA, then the affordability exception will apply. Thus, the licensee will be required to prepay only what it can afford and it must return the rest of the spectrum to the Commission for reauction. As with prepayment of full 30 MHz licenses, the exception will not apply if any "new money" is added to make prepayment, and the exception may be applied to only one MTA.

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<sup>136</sup> The portion of the down payment applicable to the returned spectrum is the equivalent of 50 percent of the down payment made on the original 30 MHz license.

56. We received numerous requests to allow licensees to receive credit for their entire down payment under the disaggregation option.<sup>137</sup> We consider it inadvisable to provide full credit because we believe that to do so would undermine the integrity of the auction process.<sup>138</sup> As the Commission concluded in the *Second Report and Order*, allowing licensees to use their entire down payment would be unfair to those C block licensees electing to continue under the existing installment payment plan and to bidders that were unsuccessful in the auction.<sup>139</sup> We note that we already provide a substantial credit, and we believe that providing any further credit would not be sound public policy. As Fidelity Capital observes, if a licensee "believes the Commission is not providing an attractive disaggregation policy, then it is free to disaggregate its spectrum privately to another qualifying entity."<sup>140</sup>

57. Because numerous benefits are conferred under the disaggregation option, we disagree with NextWave, ClearComm, and other parties that not providing a refund or credit for all of the down payment constitutes a penalty or forfeiture.<sup>141</sup> Under disaggregation, the Commission forgives up to half of a licensee's outstanding debt, an action that will facilitate investment and growth by making more funds available to licensees for build-out. In addition, the Commission provides low-cost, long-term financing for the retained spectrum. Furthermore, the Commission renders a valuable service by providing an efficient and cost-effective mechanism for transferring spectrum that licensees otherwise might have been forced to resell in the secondary market at great risk. In exchange, the Commission receives the disaggregated spectrum and retains a portion of the down payment

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<sup>137</sup> See Airtel Petition at 1; Alpine Petition at 9; Cellexis Petition at 6; Cellnet Petition at 2; Christensen Petition at 1; ClearComm Petition at 6-18; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; Meretel Petition at 3; MFRI Petition at 4; NextWave Petition at 10-15; New Wave Petition at 1; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 5; UCNI Petition at 2; URS Greiner Petition at 1; Wireless Nation Petition at 2; ClearComm Opposition at 2-4; Duluth PCS, et al. Opposition at 5-8; Polycell Opposition at 5-8; Third Kentucky Opposition at 2; ClearComm Reply at 3-6; Hyundai Reply at 4-7; Wireless Ventures Reply at 3; CX Systems *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1. See also Hyundai Petition at 4-7; Christensen *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Florida Power *ex parte* filing at 1; Kabbara *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1.

<sup>138</sup> See Communications Act § 309(j), 47 U.S.C. § 309(j).

<sup>139</sup> *Second Report and Order*, 12 FCC Rcd at 16,468 para. 65; see also Sprint Opposition at 4-5.

<sup>140</sup> Fidelity Capital Opposition at 4-5 (the present terms of the disaggregation option are fair). *But see* ClearComm Reply at 7 (Fidelity Capital's argument favoring private disaggregation overlooks the fact that the Commission can more efficiently redistribute the disaggregated spectrum).

<sup>141</sup> NextWave Petition at 10-15 (no rational basis exists for the penalty because no rule has been violated and no default or bid withdrawal has occurred); ClearComm Petition at 6-18 (there is no equitable or legal justification for the penalty because disaggregating licensees willingly surrender a *pro rata* portion of spectrum); ClearComm Reply at 2-6 (by imposing a penalty on disaggregating licensees, the Commission's action is inconsistent with that of a reasonable commercial lender). See, e.g., Cellexis Petition at 6; Hyundai Petition at 4-7; Meretel Petition at 3; MFRI Petition at 4; New Wave Petition at 2; ClearComm Opposition at 2-4; Duluth PCS, et al. Opposition at 5-8; Polycell Opposition at 5-8; Hyundai Reply at 4-7.

applicable to that spectrum. Therefore, retention of part of the down payment is not a penalty; rather, it is the fair and reasonable price for receiving the benefits of disaggregation.

58. We are not persuaded that we should add even greater flexibility to the disaggregation option. We decline to adopt MFRI's suggestion that we allow C block licensees to retain the 15 MHz of spectrum adjacent to the F block if they also hold the F block license for the same BTA.<sup>142</sup> Allowing certain C block licensees to disaggregate a different portion of spectrum would create a patchwork pattern of spectrum blocks in the reauction and would limit the opportunity for F block licensees to aggregate larger spectrum blocks by bidding on contiguous spectrum in the reauction. To promote consistency and simplicity in the reauction, we also reject McBride's request that we allow licensees the choice to disaggregate 10, 15, or 20 MHz of spectrum.<sup>143</sup> Allowing licensees to disaggregate different pieces of spectrum would create inefficiency in the market and would limit the potential for aggregation, thereby decreasing the value of spectrum in the reauction and delaying service to the public. Finally, we disagree with Alpine and Urban Communicators that disaggregation should be permitted on a BTA-by-BTA basis, rather than on an MTA-by-MTA basis.<sup>144</sup> As AirGate notes, disaggregation on an MTA-by-MTA basis will promote participation in the reauction because licensees are prohibited from selectively retaining 30 MHz of spectrum in only the most desirable BTAs.<sup>145</sup>

59. NextWave and Cellexis argue that the build-out exception permitted under the amnesty option should be extended to licensees selecting the disaggregation option.<sup>146</sup> Under our modified approach, a build-out exception is unnecessary because licensees have the flexibility to determine which MTAs to retain and which to surrender. Nonetheless, as stated in the *Second Report and Order*, a build-out exception was never needed under the disaggregation option because, unlike

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<sup>142</sup> MFRI Petition at 6.

<sup>143</sup> McBride Petition at 5. In addition, McBride claims that, by allowing the entry of more competitors through disaggregation, the Commission has frustrated expectations that a maximum of six PCS licenses would exist in each market (one each for blocks A through F). *Id.* at 2. McBride's argument is misplaced because Section 24.714 of the Commission's rules permit broadband PCS licensees in blocks A through F to disaggregate any amount of spectrum through the marketplace to qualified entities. 47 C.F.R. § 24.714. Moreover, it has always been the Commission's goal to encourage the widest participation in the wireless market, in accordance with Congress' mandate. *See* Communications Act § 309(j)(3)(B), 47 U.S.C. § 309(j)(3)(B).

<sup>144</sup> Alpine Petition at 9; Urban Communicators Petition at 9. Alpine offers no rationale for a BTA-by-BTA requirement, and Urban Communicators makes an unpersuasive claim that an MTA-by-MTA requirement provides little relief for licensees that hold licenses in only one MTA. A licensee disaggregating spectrum in its only MTA would receive all the benefits of disaggregation, including the forgiveness of half its outstanding debt.

<sup>145</sup> AirGate Opposition at 14-15; *see also Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

<sup>146</sup> NextWave Petition at 15-16; Cellexis Petition at 6. In addition, a number of parties argue generally that licensees should be allowed to retain licenses in which they have made significant build-out. *See* Airtel Petition at 1; Christensen Petition at 1; CVI Wireless Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; URS Greiner Petition at 1; Dorne & Margolin *ex parte* filing at 1.

the original amnesty option, the disaggregation option was never an "all-or-nothing" proposition.<sup>147</sup> Under the original amnesty option, a licensee was required to surrender all licenses except for those in MTAs in which it satisfied the build-out requirement. By comparison, disaggregation was permitted on an MTA-by-MTA basis, and so licensees were never compelled to disaggregate spectrum in all their MTAs.

60. Finally, we affirm the statement in the *Second Report and Order* that upon acceptance of the election notice, the disaggregated spectrum will be deemed returned to the Commission.<sup>148</sup> Further, after disaggregation, notwithstanding the fact that a disaggregating licensee will continue to hold in its possession a 30 MHz license, that license will no longer authorize use of the 15 MHz of spectrum that is surrendered to the Commission but will continue to be valid with respect to the 15 MHz of spectrum that is retained.

## IX. ELECTION PROCEDURES

### A. Background

61. In the *Second Report and Order*, the Commission established January 15, 1998, as the deadline for C block licensees to elect to continue under the existing installment payment plan or to elect one of the three alternative options.<sup>149</sup> The Commission also required, *inter alia*, C block licensees whose elections would necessitate ongoing payments to execute any necessary financing documents pursuant to appropriate requirements and time frames established by the Bureau. The Commission specified procedures to be followed by licensees electing to continue under their existing notes or electing disaggregation, amnesty, or prepayment.

62. On January 7, 1998, we changed the election date to February 26, 1998, in order to allow licensees to submit their elections after final disposition of arguments raised on reconsideration.<sup>150</sup> On February 24, 1998, we issued an order changing the election date to 60 days after publication of this *Order on Reconsideration* in the *Federal Register*.<sup>151</sup>

### B. Discussion

63. Moving the election date was an appropriate action given the large number of petitions for reconsideration filed in this proceeding. The revised deadline has provided sufficient time for us to respond to arguments raised on reconsideration so that licensees can be assured of regulatory certainty before making their elections. The postponement satisfies the requests of several parties that

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<sup>147</sup> *Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

<sup>148</sup> *Id.*, 12 FCC Rcd at 16,470 para. 73.

<sup>149</sup> *Id.*, 12 FCC Rcd at 16,470 para. 70.

<sup>150</sup> *Election Date Order I* at para. 2.

<sup>151</sup> *Election Date Order II*.

the date be delayed.<sup>152</sup> We deny, however, other requests for a still longer postponement.<sup>153</sup> Licensees already have had several months in which to consider the options under the *Second Report and Order*, and we believe that 60 days after publication in the *Federal Register* will provide sufficient time for any reevaluation that may be necessary in light of the modifications we make in this Order.<sup>154</sup>

64. We disagree with Omnipoint that NextWave should be required to make its election in advance of other C block licensees.<sup>155</sup> Omnipoint claims that NextWave is so dominant in the market that its election decision will have a dramatic impact on the relative value of choices made by the other licensees.<sup>156</sup> Omnipoint argues that, for example, other licensees might be reluctant to surrender spectrum if they knew NextWave was keeping its spectrum because reauction opportunities would be severely limited without the return of any NextWave licenses.<sup>157</sup> We agree with NextWave that all C block licensees should be treated equally, and we will not discriminate against one licensee in order to grant others a competitive advantage.<sup>158</sup>

65. In the *Second Report and Order*, the Commission inadvertently omitted reference to the requirement that F block licensees execute fully and deliver timely all necessary financing documents. Consequently, we now clarify that F block licensees, as well as C block licensees, must execute and deliver all necessary financing documents pursuant to appropriate requirements and time frames as will be established by the Bureau in a forthcoming public notice on procedures. We modify

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<sup>152</sup> See, e.g., Horizon Petition at 2 (requesting that the election deadline be moved to March 15, 1998); MFRI Opposition at 2; Third Kentucky Opposition at 2; RFW *ex parte* filing at 1-2. *But see* AirGate Opposition at 15-16 (the January 15, 1998, election date should be maintained).

<sup>153</sup> See NextWave Petition at 19-22 (before requiring licensees to make an election, the Commission should resolve control group issues, clarify the role of the Department of Justice, and adopt final World Trade Organization implementation rules); Polycell Opposition at 4-5 (same as NextWave); Duluth PCS, et al. Opposition at 4-5 (same as NextWave); Omnipoint Petition at 13-14 (before licensees relinquish valuable spectrum assets, the Commission should clarify its position on bankruptcy and its jurisdiction to engage in debt forgiveness); Omnipoint Opposition at 13-14 (before licensees are required to make irreversible elections, the Commission should issue final decisions on the note interest rate, the procedures for implementing resumption of payments, election filing procedures, the Commission's position on bankruptcy, and the role of the Department of Justice). MFRI asks that the election date be postponed until the bid signaling practices in the D, E, and F block auction have been resolved. MFRI Petition at 3. We note that on September 5, 1997, the Commission announced the implementation of click-box bidding, one purpose of which is to prevent bid signaling practices. See "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," *Public Notice*, 12 FCC Rcd 13,449 (WTB 1997).

<sup>154</sup> See Northern Michigan Petition at 10 (the election date should be at least 60 days after the release of the order on reconsideration of the *Second Report and Order*).

<sup>155</sup> Omnipoint Petition at 6-8; Omnipoint Reply at 2-5.

<sup>156</sup> Omnipoint Petition at 6.

<sup>157</sup> *Id.* at 7-8.

<sup>158</sup> NextWave Opposition at 2.

the *Second Report and Order* to require both C and F block licensees that fail to execute fully and deliver timely to the Commission any required financing documents to pay on the payment resumption date all unpaid simple interest accruing from the date of license grant through the payment resumption date.<sup>159</sup> The Bureau's forthcoming public notice also will set forth updated election procedures for C block licensees, reflecting our modifications to the *Second Report and Order*.

## X. REAUTION

### A. Timing

66. On January 7, 1998, we announced that the C block reaution would begin on September 29, 1998.<sup>160</sup> In light of the postponement of both the election date and the payment resumption date, as discussed above, it will be necessary to establish a new reaution date. We delegate to the Bureau the authority to establish the reaution date. We instruct the Bureau to issue a public notice announcing the new date at least three months in advance of the start of the reaution.

67. CPCS I, a winning bidder for nine licenses in the C block auction whose license grants were subject to resolution of an Application for Review pending at the time of the release of the *Second Report and Order*, asks the Commission not to begin the reaution until final action on its Application for Review or, in the event no such action occurs, until the Pocket and GWI bankruptcy proceedings conclude.<sup>161</sup> Because the Commission granted CPCS I's Application for Review on December 24, 1997,<sup>162</sup> CPCS I's request is moot and there is no need to address the merits of CPCS I's request.

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<sup>159</sup> See *Second Report and Order*, 12 FCC Rcd at 16,471 para. 76 (requiring payment of all Suspension Interest, which included interest only through the previous payment resumption date of March 31, 1998).

<sup>160</sup> See *Election Date Order I* at para. 3. The Commission has proposed including the following licenses in the reaution: (1) all licenses representing the disaggregated spectrum surrendered to the Commission under the disaggregation option; (2) all licenses surrendered to the Commission by licensees taking advantage of the Commission's prepayment or amnesty options; and (3) all PCS C block licenses currently held by the Commission as the result of previous defaults. See *Further Notice*, 12 FCC Rcd at 16,474 para. 83.

<sup>161</sup> CPCS I Petition at 4-9. *But see* AirGate Opposition at 16 (encouraging the Commission to reject CPCS I's Application for Review in time for those licenses to be included in the reaution and arguing that the reaution should not be delayed by the bankruptcy proceedings).

<sup>162</sup> See Carolina PCS I Limited Partnership Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding BTA Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, Frequency Block C, *Memorandum Opinion and Order*, FCC 97-417 (released December 24, 1997).

## B. Eligibility

### 1. Background

68. The *Second Report and Order* specified that all entrepreneurs, all entities that had been eligible for and had participated in the original C block auction, and all current C block licensees would be eligible to bid in the reauction.<sup>163</sup> The Commission, however, created an exception for incumbent licensees: for a period of two years from the start date of the reauction, C block licensees (defined as qualifying members of the licensee's control group, and their affiliates) that opted for the disaggregation or prepayment options would be prohibited from reacquiring, either through the reauction or through any secondary market transaction, any spectrum or licenses that they surrendered to the Commission under those options.<sup>164</sup> Such licensees, however, would be permitted to bid on spectrum or licenses surrendered by other licensees, provided that such licensees were not affiliates.<sup>165</sup> Licensees electing the amnesty option would be eligible to bid for any and all licenses at the reauction, with no restrictions on post-auction acquisitions.<sup>166</sup>

### 2. Discussion

69. The only reauction eligibility issues set forth in the *Second Report and Order* ripe for reconsideration in this phase of the proceeding are those related directly to whether and how a licensee's election of a particular payment option should affect its eligibility to participate in the reauction of, or reacquire an ownership interest in, surrendered spectrum. We defer to other phases of WT Docket No. 97-82 additional eligibility issues, including the qualifications of entities that have defaulted on payments to participate in the reauction<sup>167</sup> and the use of a "controlling interest" approach rather than "control group" structures to determine financial size in the C block, as well as in all auctionable services.<sup>168</sup> We note that, in its comments filed in response to the *Further Notice*, Nextel Communications, Inc. challenges the Commission's ruling in the *Second Report and Order* that

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<sup>163</sup> *Second Report and Order*, 12 FCC Rcd at 16,448 para. 22; *see also Further Notice*, 12 FCC Rcd at 16,474 para. 84.

<sup>164</sup> *Second Report and Order*, 12 FCC Rcd at 16,457, 16,470 paras. 42, 69.

<sup>165</sup> *Id.*, 12 FCC Rcd at 16,457 para. 42; *see also id.*, 12 FCC Rcd at 16,470 para. 69.

<sup>166</sup> *Id.*, 12 FCC Rcd at 16,462 para. 54.

<sup>167</sup> Comment is sought on this issue in the *Further Notice*, 12 FCC Rcd at 16,474 para. 84.

<sup>168</sup> NextWave Petition at 20; *accord* Duluth PCS, et al. Opposition at 4-5; Polycell Opposition at 4-5; *cf.* AmeriCall Opposition at 7-8 (arguing that the 10 percent control group institutional investor rule, 47 C.F.R. § 24.709(b)(5)(i)(C), and the 25 percent nonattributable ownership limit, 47 C.F.R. § 24.709(b)(3)(i), should be eliminated because they unnecessarily restrict access to capital from noncontrolling investors). Comment is sought on this issue in *Part 1 Third Report and Order*; *see also* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5693 n.17, 5703 paras. 11, 28 (1997).

participation in the C block reauction is limited to qualified entrepreneurs.<sup>169</sup> In their petitions for reconsideration, Cellexis and RFW respond to Nextel's arguments and urge the Commission not to reconsider its decision.<sup>170</sup> We address Nextel's challenge here, notwithstanding the fact that Nextel's request was not filed as a petition for reconsideration of the *Second Report and Order*. We conclude that Nextel has not provided a convincing rationale for deviating from the public interest goals articulated by the Commission in the *Second Report and Order*.<sup>171</sup> Consequently, we affirm the Commission's earlier ruling to limit eligibility for participation in the reauction to applicants meeting the current definition of "entrepreneur."<sup>172</sup>

70. On reconsideration, we make a change to the eligibility requirements, which already has been discussed above, and also a clarification. As we stated previously, a licensee that elects the amnesty option for an MTA and opts to receive partial credit for down payments on its returned licenses in that MTA will not be eligible to reacquire those licenses through either reauction or any secondary market transaction for a period of two years from the start date of the reauction. This restriction also applies to the licensee's affiliates. Likewise, if a licensee disaggregates an MTA, neither it nor its affiliates may bid on the returned spectrum in the reauction or reacquire it through a secondary market transaction for two years after the start date of the reauction. Licensees that return licenses under the amnesty option or spectrum under the disaggregation option are not precluded from bidding in the reauction on licenses or spectrum returned by other non-affiliated licensees (or from later reacquiring those licenses or spectrum in post-auction transactions). We clarify that the term "affiliate" is defined by our competitive bidding rules in the *Part 1 Third Report and Order*.<sup>173</sup>

71. Several parties believe that we should revise our bidding eligibility requirements.<sup>174</sup> Sprint, for example, agrees with the Commission's decision to exclude C block licensees that choose disaggregation or prepayment from bidding on their surrendered spectrum at reauction, but contends that the Commission undermines the integrity of the auction process by not similarly limiting the ability of licensees that select the amnesty option.<sup>175</sup> Sprint believes that the lack of such a restriction will unjustly enrich licensees that select the amnesty option and then bid for the same spectrum at a

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<sup>169</sup> See Comments filed by Nextel Communications, Inc. on November 13, 1997 at 7-9.

<sup>170</sup> See Cellexis Petition at 7-8; RFW Petition at 6-7. See also MFRI Reply at 6-7 (expressing concern that large incumbents advocate opening the C block reauction to all bidders); Wireless Ventures Reply at 4 (same).

<sup>171</sup> See *Second Report and Order*, 12 FCC Rcd at 16,448 para. 22.

<sup>172</sup> *Id.*

<sup>173</sup> 47 C.F.R. § 1.2110(b)(4); *Part 1 Third Report and Order* at paras. 29-30.

<sup>174</sup> Compare Northern Michigan Petition at 6 (licensees electing disaggregation should be allowed to participate in the reauction) and Cellexis Petition at 6 (the C block reauction should be open to all non-defaulting C block licensees, irrespective of the chosen option) with Antigone/Devco Opposition at 5-6 (bidders electing any of the special relief options should be barred from participating in any future C block reauctions).

<sup>175</sup> Sprint Petition at 3-4.

likely discount.<sup>176</sup> NextWave, on the other hand, claims it is unreasonably discriminatory to preclude entities choosing disaggregation or prepayment from reacquiring their surrendered spectrum for two years while allowing entities choosing the amnesty option to reacquire their spectrum immediately either by reauction or through secondary markets.<sup>177</sup>

72. We believe our modified approach addresses both these arguments. In response to NextWave, we note that licensees electing disaggregation and/or prepayment for one MTA now can choose to return licenses in other MTAs and bid on those licenses in the reauction. However, in response to Sprint, we point out that licensees electing amnesty for an MTA must forgo their entire down payment if they wish to bid on their returned licenses for that MTA. We believe that this cost sufficiently mitigates any concern of unjust enrichment.

## XI. MISCELLANEOUS MATTERS

### A. Cross Defaults

73. The *Second Report and Order* provided that if a licensee defaulted on a C block license, the Commission would not pursue cross default remedies with regard to the licensee's other licenses in the C or F blocks.<sup>178</sup> In other words, if a licensee defaulted on a given C block license but was meeting its payment obligations on its other C or F block licenses, the Commission would not declare the licensee to be in default with respect to those other C or F block licenses.<sup>179</sup> We disagree with CIRI that, by not imposing cross default remedies, we encourage auction participants to bid speculatively and then "cherry-pick" among the licenses they ultimately decide to keep by simply defaulting on the ones they no longer desire.<sup>180</sup> As explained earlier, we have implemented numerous procedures to safeguard against "cherry-picking." Moreover, we believe that by not imposing cross default remedies, we encourage regional financing. Even if a licensee's holdings in one region have proven unattractive to the financial market, the same licensee's holdings in other markets may be financially sound. Therefore, we will not depart from the decision in the *Second Report and Order*. We note that licensees that ultimately default will continue to be subject to debt collection procedures.<sup>181</sup>

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<sup>176</sup> *Id.* at 2-3; Sprint Opposition at 3.

<sup>177</sup> NextWave Petition at 18-19; *accord* Polycell Opposition at 8-9; Duluth PCS, et al. Opposition at 8-9.

<sup>178</sup> *Second Report and Order*, 12 FCC Rcd at 16,472-73 para. 79.

<sup>179</sup> *Id.*

<sup>180</sup> See CIRI Petition at 6-8. *But see* AmeriCall Opposition at 8-11 ("Suffering default penalties is not an encouragement to 'cherry-pick.'").

<sup>181</sup> 47 C.F.R. § 1.2110(f)(4)(iv).

## B. No Extension of C Block Relief to Other Licensees

74. We reject various requests to grant F block licensees the same relief provided to C block licensees.<sup>182</sup> Cellular Holding contends that C and F block licensees should be treated similarly because: (1) both are licensed to provide broadband PCS; (2) they were granted their licenses within 7.5 months of one another; (3) Section 24.709 of the Commission's rules governs bidder eligibility for both blocks; (4) their market boundaries are identical; (5) they will have nearly the same amount of spectrum if C block licensees choose disaggregation; and (6) they both compete with larger, more experienced competitors that received a head-start.<sup>183</sup> Cellular Holding, however, ignores the fact that C and F block licensees are not similarly situated with respect to the most relevant factor -- the need for financial relief.

75. After careful review, the Commission determined in the *Second Report and Order* that "the nature and extent of any financing difficulties faced by the C block licensees appear to be different from any such problems facing entrepreneurs in the F block."<sup>184</sup> C block prices were higher, on average, than F block prices.<sup>185</sup> We disagree with several parties that argue that the Commission's explanation in the *Second Report and Order* fails to justify disparate treatment.<sup>186</sup> The difficulties in financing the unexpectedly high prices bid in the C block auctions is a sufficiently distinguishing basis for limiting relief to C block licensees. As further justification, we agree with AmeriCall that the C block situation was the result of a unique set of mostly unpredictable events, including litigation and resulting licensing delays and the lack of a simultaneous non-entrepreneur auction that could have been used to ease price pressures.<sup>187</sup>

76. The need for C block relief was due to exceptional and urgent circumstances, and because it is essential to maintain the integrity of the auction process, only the most exigent situation would cause us to offer such relief. Even in addressing the C block financing situation, the Commission provided options that offered only limited relief so as to be fair to bidders that withdrew from the auction. We therefore are not persuaded by Central Oregon's claim that F block licensees should be granted relief because A, B, and C block licensees have a competitive advantage given their

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<sup>182</sup> Central Oregon Petition at 2-4; Cellular Holding Petition at 2-5; Duluth PCS, et al. Opposition at 10; Polycell Opposition at 10; Eldorado Reply at 2-4.

<sup>183</sup> Cellular Holding Petition at 2-3.

<sup>184</sup> *Second Report and Order*, 12 FCC Rcd at 16,447 para. 20.

<sup>185</sup> See "D/E/F Band PCS Auction Results in Lower Spectrum Prices But Another Win for CDMA Proponents," U.S. Telecommunications, SBC Warburg Inc. (January 28, 1997) (D, E, and F spectrum prices 75 percent lower than C band auction); Donaldson, Lufkin & Jenrette, *The Wireless Communications Industry* (Spring 1997) at 20 ("D, E and F Auction Prices Surprisingly Low").

<sup>186</sup> See Central Oregon Petition at 2-4; Omnipoint Opposition at 12; Eldorado Reply at 3-4.

<sup>187</sup> AmeriCall Opposition at 3-4. See also NextWave Reply at 3.

earlier licensing date and their larger amounts of spectrum.<sup>188</sup> We also reject Omnipoint's argument that C block options should be available to entrepreneurs with D, E, and F block licenses because C block relief will change the relative values of those licenses.<sup>189</sup> These arguments do not present sufficiently compelling reasons to apply the "extraordinary procedures" we adopted for C block licensees to D, E, and F block licensees.<sup>190</sup> In addition, CONXUS, the only party to address this issue, argues that narrowband PCS entities should receive relief comparable to that afforded C block licensees because they compete in the same consumer and financial markets and face similar circumstances.<sup>191</sup> The record in this reconsideration proceeding is insufficient to adopt global changes affecting narrowband PCS entities, but we note that payment matters for these entities are currently being examined in another proceeding before the Commission.<sup>192</sup>

### C. Issues Addressed in Other Proceedings or Requiring Action by Congress

77. A number of parties make requests involving issues either that will be, or have been, addressed in other proceedings or that require action by Congress. For example, several petitioners urge the Commission to reduce the interest rate for C block installment payments.<sup>193</sup> The Bureau will address this issue in a forthcoming order. With respect to Northern Michigan's request that we allow commercial lenders to acquire a security interest in licenses, we note that we previously resolved the issue in another proceeding.<sup>194</sup>

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<sup>188</sup> Central Oregon Petition at 2-4.

<sup>189</sup> Omnipoint Petition at 9-10; Omnipoint Opposition at 11-12.

<sup>190</sup> *Second Report and Order*, 12 FCC Rcd at 16,437-38 para. 2.

<sup>191</sup> CONXUS Petition at 3-5; CONXUS Opposition at 2-8; CONXUS Reply at 4-10. CONXUS claims its experience is similar to the C block situation, including delays in market entry, its problems in raising capital, high bid amounts, a post-auction rule change, and the lack of a simultaneous non-entrepreneur auction.

<sup>192</sup> *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Narrowband PCS*, PP Docket No. 93-253, *Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12,972 (1997).

<sup>193</sup> Northern Michigan Petition at 8-9 (interest rate for C block licensees should be standardized at 6.5 percent); Alpine Petition at 11-12 and Alpine Reply at 6-8 (interest rate should be reduced to 5.56 percent); McBride Petition at 4 (the Commission should set the interest rate uniformly at 5.75 percent).

<sup>194</sup> Northern Michigan Petition at 8. *See also* McBride Petition at 4. Our position on this issue was addressed in Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, FCC 97-60 (released February 28, 1997) at para. 12 ("debtors may grant to other parties a subordinated security interest in the proceeds of an authorized assignment or transfer of the license to a third party, provided however that any such security interest shall be subordinated to and in no way inconsistent with the Commission's security interest in the license").

78. TAP encourages the Commission to seek Congressional authority to award tax certificates to entities that provide investment capital to C block licensees.<sup>195</sup> Section 309(j)(4)(D) of the Communications Act mandates that, in seeking to ensure that designated entities are "given the opportunity to participate in the provision of spectrum-based services," the Commission shall "consider the use of tax certificates."<sup>196</sup> By allowing a tax deferral of the gain realized on an investment, tax certificates provide a significant means of enhancing the value of an investment in an enterprise, and we believe that a tax certificate program for spectrum-based services would be as beneficial to the wireless industry as the Commission's tax certificate programs were for the broadcast and cable industries.<sup>197</sup> However, in view of Congress' repeal in 1995 of Section 1071 of the IRS Code,<sup>198</sup> which granted the Commission authority to use tax certificates to promote Commission policies, we believe that legislative action would be necessary before we could provide such tax relief. Accordingly, we urge Congress to review the positive impact of the Commission's previous tax certificate programs and to grant us the authority to establish a similar program for wireless enterprises, which we believe would promote competition in the telecommunications industry by encouraging investment in new services.

## **XII. PROCEDURAL MATTERS AND ORDERING CLAUSES**

### **A. Supplemental Final Regulatory Flexibility Analysis**

79. The Supplemental Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is attached at Appendix C.

### **B. Paperwork Reduction Act Analysis**

80. This Order contains a modified information collection that was submitted to the Office of Management and Budget requesting emergency clearance under the Paperwork Reduction Act of 1995.

### **C. Ordering Clauses**

81. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the petitions for reconsideration filed in response to the *Second Report and Order* are GRANTED IN PART and DENIED IN PART, as provided herein.

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<sup>195</sup> TAP Reply at 4-10. *See also* McBride Petition at 5.

<sup>196</sup> Communications Act § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

<sup>197</sup> *See* TAP Reply at 5-6 (citing Erwin G. Krasnow, "A Case for Minority Tax Certificates," *Broadcasting & Cable*, December 15, 1997, at 80) (the Commission's tax certificate program greatly increased minority ownership of broadcast and cable entities and "gave minority entrepreneurs increased access to the market for broadcast and cable properties, gave them a chip at the bargaining table and opened doors at financial institutions that had been closed").

<sup>198</sup> Pub. L. No. 104-7, § 2, 109 Stat. 93, 93-94 (1995).

82. IT IS FURTHER ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the modifications to the Commission's rules, as described herein and in Appendix B, ARE HEREBY ADOPTED. These modifications shall become effective 60 days after publication of this *Order on Reconsideration of the Second Report and Order* in the *Federal Register*.

83. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

84. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Order on Reconsideration of the Second Report and Order*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

**APPENDIX A****Petitions for Reconsideration**

1. Airtel Communications, Inc. ("Airtel")
2. Alpine PCS, Inc. ("Alpine")
3. AmeriCall International, L.L.C. ("AmeriCall")
4. Carolina PCS I Limited Partnership ("CPCSI")
5. Cellexis International, Inc. ("Cellexis")
6. Cellnet ("Cellnet")
7. Cellular Holding, Inc. ("Cellular Holding")
8. Central Oregon Cellular, Inc. ("Central Oregon")
9. Christensen Engineering & Surveying ("Christensen")
10. ClearComm, L.P. ("ClearComm")
11. CONXUS Communications, Inc. ("CONXUS")
12. Cook Inlet Region, Inc. ("CIRI")
13. CVI Wireless
14. DiGiPH PCS, Inc. ("DiGiPH")
15. Federal Network
16. Fox Communications
17. General Wireless, Inc. ("GWI")
18. Horizon Personal Communications, Inc. ("Horizon")
19. Hyundai Electronics America ("Hyundai")
20. Koll Telecommunication Services ("Koll")
21. Leifer, Marter Architects ("Leifer, Marter")
22. McBride, Vincent ("McBride")
23. Meretel Communications, L.P. ("Meretel")
24. MFRI Incorporated ("MFRI")
25. NextWave Telecom Inc. ("NextWave")
26. New Wave Inc. ("New Wave")
27. Northern Michigan PCS Consortium L.L.C. and Wireless 2000, Inc. ("Northern Michigan")
28. Omnipoint Corporation ("Omnipoint")
29. One Stop Wireless of America, Inc. ("One Stop Wireless")
30. OnQue Communications, Inc. ("OnQue")
31. Prime Matrix Wireless Communications ("Prime Matrix")
32. RFW PCS Inc. ("RFW")
33. Sprint Corporation ("Sprint")
34. United Calling Network, Inc. ("UCNI")
35. Urban Communicators PCS Limited Partnership ("Urban Communicators")
36. URS Greiner, Inc. ("URS Greiner")
37. Wireless Nation, Inc. ("Wireless Nation")

**Oppositions**

1. AirGate Wireless, L.L.C. ("AirGate")
2. ALLTEL Communications, Inc. ("ALLTEL")
3. AmeriCall International, L.L.C. ("AmeriCall")
4. Antigone Communications Limited Partnership and PCS Devco, Inc. ("Antigone/Devco")
5. AT&T Wireless Services, Inc. ("AT&T")
6. ClearComm, L.P. ("ClearComm")
7. CONXUS Communications, Inc. ("CONXUS")
8. Duluth PCS, Inc., St. Joseph PCS, Inc., and West Virginia PCS, Inc. ("Duluth PCS, et al.")
9. Fidelity Capital
10. MFRI Incorporated ("MFRI")
11. NextWave Telecom Inc. ("NextWave")
12. Northcoast Communications, L.L.C. ("Northcoast")
13. Omnipoint Corporation ("Omnipoint")
14. Polycell Communications, Inc. ("Polycell")
15. PrimeCo Personal Communications, L.P. ("PrimeCo")
16. Sprint Corporation ("Sprint")
17. Third Kentucky PCS "Third Kentucky")

**Replies to Oppositions**

1. Alpine PCS, Inc. ("Alpine")
2. Cellexis International, Inc. ("Cellexis")
3. ClearComm, L.P. ("ClearComm")
4. CONXUS Communications, Inc. ("CONXUS")
5. CX Systems Int'l, Inc. ("CX Systems")
6. Eldorado Communications, L.L.C. ("Eldorado")
7. Federal Network
8. Frontier Corporation ("Frontier")
9. Hyundai Electronics America ("Hyundai")
10. MFRI Incorporated ("MFRI")
11. NextWave Telecom Inc. ("NextWave")
12. Omnipoint Corporation ("Omnipoint")
13. RFW PCS Inc. ("RFW")
14. Telecommunications Advocacy Project ("TAP")
15. Third Kentucky Cellular Corp. ("Third Kentucky")
16. Wireless Ventures, Inc. ("Wireless Ventures")

**Ex Parte Filings**

1. AirGate Wireless, L.L.C. ("AirGate"), February 9, 1998
2. AmeriCall International, L.L.C. ("AmeriCall"), March 12, 1998
3. Christensen Engineering & Surveying ("Christensen"), December 19, 1997
4. ClearComm, L.P. ("ClearComm"), February 23, 1998
5. ClearComm, L.P. ("ClearComm"), March 13, 1998
6. Congressman Gary L. Ackerman, January 15, 1998
7. Congressman Xavier Becerra, February 3, 1998
8. Congresswoman Sue W. Kelly, December 31, 1997
9. Congressman Albert R. Wynn, February 9, 1998
10. CX Systems Int'l, Inc. ("CX Systems"), December 10, 1997
11. Cyber Sites, L.L.C. ("Cyber Sites"), December 1, 1997
12. Datacomm Research Company, February 20, 1998
13. Dorne & Margolin, December 1, 1997
14. Florida Power Corporation ("Florida Power"), December 19, 1997
15. Gilder Technology Group, Inc., February 16, 1998
16. Joint filing by 43 companies, February 20, 1998
17. Kabbara Engineering ("Kabbara"), December 26, 1997
18. LaBarge Clayco Wireless, L.L.C. ("LaBarge Clayco"), December 24, 1997
19. Leifer, Marter Architects ("Leifer, Marter"), December 17, 1997
20. Members of the Congressional Hispanic Caucus, February 5, 1998
21. MJA Communications Corp. ("MJA"), December 22, 1997
22. New Wave Inc. ("New Wave"), January 20, 1998
23. New Wave Inc. ("New Wave"), February 17, 1998
24. NextWave Telecom Inc. ("NextWave"), January 21, 1998
25. OPM USA, Inc. ("OPM"), December 23, 1997
26. Praxis Telecom, January 26, 1998
27. Prudential Securities Inc., February 26, 1998
28. R&S PCS, Inc., February 11, 1998
29. RFW PCS Inc. ("RFW"), December 23, 1997
30. Senator Barbara Boxer, February 13, 1998
31. Senators Richard H. Bryan and Harry Reid, January 29, 1998
32. Senator Thomas Daschle, February 11, 1998
33. Senator J. Robert Kerrey, February 12, 1998
34. Specialty Teleconstructors Inc. ("Specialty Teleconstructors"), December 19, 1997
35. Structure Consulting Group ("Structure Consulting"), December 22, 1997
36. Wireless Nation, Inc. ("Wireless Nation"), January 23, 1998
37. Xway, Inc. ("Xway"), December 16, 1997
38. 2001 Personal Communication, Inc., January 8, 1998

**APPENDIX B****Revised Rules**

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 1 – PRACTICE AND PROCEDURE**

1. The authority citation for Part 1 continues to read as follows:

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 303(r), unless otherwise noted.

2. Section 1.2110 is amended by revising paragraph (f)(4)(ii), (iii), (iv) to read as follows:

**§ 1.2110 Designated Entities**

\* \* \* \* \*

(f) \* \* \*

(4) \* \* \*

(i) \* \* \*

(ii) If any licensee fails to make the required payment at the close of the 90-day period set forth in subsection (i) above, the licensee will automatically be provided with a subsequent 90-day grace period, except that no subsequent automatic grace period will be provided for payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998). \* \* \*

(iii) If an eligible entity making installment payments is more than one hundred and eighty (180) days delinquent in any payment, it shall be in default, except that C and F block licensees shall be in default if their payment due on the payment resumption date, referenced in subsection (ii) above, is more than ninety (90) days delinquent.

(iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such a grace period is available, will be declared in default, its license will automatically cancel, and will be subject to debt collection procedures.

\* \* \* \* \*

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 24 – PERSONAL COMMUNICATIONS SERVICES**

3. The authority citation for Part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332, unless otherwise noted.

4. Section 24.709 is amended by revising paragraph (b)(9)(i), (ii) (A) - (B) to read as follows:

**§ 24.709 Eligibility for licenses for frequency Blocks C and F.**

(a) \* \* \*

(b) \* \* \*

(9) *Special rule for licensees disaggregating or returning certain spectrum in frequency block C.*

(i) In addition to entities qualifying under this section, any entity that was eligible for and participated in the auctions for frequency block C, which began on December 18, 1995, and July 3, 1996, will be eligible to bid in a reauction of block C spectrum surrendered pursuant to Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998).

(ii) The following restrictions will apply for any reauction of frequency block C spectrum conducted after March 24, 1998:

(A) Applicants that elected to disaggregate and surrender to the Commission 15 MHz of spectrum from any or all of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998), will not be eligible to apply for such disaggregated spectrum until 2 years from the start of the reauction of that spectrum.

(B) Applicants that surrendered to the Commission any of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998), will not be eligible to apply for the licenses that they surrendered to the Commission until 2 years from the start of the reauction of those licenses if they elected to apply a credit of 70% of the down payment they made on those licenses toward the prepayment of licenses they did not surrender.

(C) \* \* \*

\* \* \* \* \*

## APPENDIX C

**Supplemental Final Regulatory Flexibility Analysis**

As required by the Regulatory Flexibility Act ("RFA"),<sup>1</sup> an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking ("Notice")* in WT Docket No. 97-82.<sup>2</sup> The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. A Final Regulatory Flexibility Analysis ("FRFA") was incorporated in the *Second Report and Order and Further Notice of Proposed Rule Making ("Second Report and Order")*.<sup>3</sup> The Commission received 37 petitions for reconsideration in response to the *Second Report and Order*. This FRFA analyzes the modifications adopted in response to those petitions for reconsideration.

**A. Need for, and objectives of, this Order.**

This *Order on Reconsideration of the Second Report and Order ("Order")* is designed to assist C block broadband personal communications services ("PCS") licensees to meet their financial obligations to the Commission while at the same time helping the Commission meet its goal of ensuring rapid provision of PCS service to the public. The *Order* provides a variety of relief mechanisms to assist C block licensees that are experiencing difficulties in meeting the financial obligations under the installment payment plan. The relief provided to C block licensees will speed deployment of service to the public by easing lenders' concerns regarding regulatory uncertainty and by potentially making more capital available for investment and growth. By facilitating the provision of service to consumers, the Commission advances Congress' objective to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public."<sup>4</sup>

**B. Summary of significant issues raised by public comments in response to the IRFA.**

There were no comments filed in response to the IRFA; however, in this proceeding we have considered the economic impact on small businesses of the modifications we have adopted. See Section E of this Supplemental FRFA, *infra*.

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<sup>1</sup> 5 U.S.C. § 604.

<sup>2</sup> Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 97-60 (released February 28, 1997).

<sup>3</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 (1997).

<sup>4</sup> Communications Act § 309(j)(3)(A), 47 U.S.C. § 309(j)(3)(A).

**C. Description and estimate of the number of small entities to which rules will apply.**

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.<sup>5</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>6</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.<sup>7</sup> Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration ("SBA").<sup>8</sup>

This *Order* applies to broadband PCS C and F block licensees. The Commission, with respect to broadband PCS, defines small entities to mean those having gross revenues of not more than \$40 million in each of the preceding three calendar years.<sup>9</sup> This definition has been approved by the SBA.<sup>10</sup> On May 6, 1996, the Commission concluded the broadband PCS C block auction. The broadband PCS D, E, and F block auction closed on Jan. 14, 1997. Ninety bidders (including the C block reauction winners, prior to any defaults by winning bidders) won 493 C block licenses and 88 bidders won 491 F block licenses. Small businesses placing high bids in the C and F block auctions were eligible for bidding credits and installment payment plans. For purposes of our evaluations and conclusion in this FRFA, we assume that all of the 90 C block broadband PCS licensees and 88 F block broadband PCS licensees, a total of 178 licensees potentially affected by this *Order*, are small entities.

**D. Description of the projected reporting, recordkeeping, and other compliance requirements.**

C block licensees must file notice of their elections with the Wireless Telecommunications Bureau no later than the election date. The election date will be 60 days after publication of the *Order* in the *Federal Register*. The *Order* increases the reporting requirements of the *Second Report*

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<sup>5</sup> 5 U.S.C. §§ 603(b)(3), 604(a)(3).

<sup>6</sup> 5 U.S.C. § 601(6).

<sup>7</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

<sup>8</sup> 15 U.S.C. § 632.

<sup>9</sup> *See* 47 C.F.R. § 24.720(b)(1).

<sup>10</sup> *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196 (1995); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5581-84 (1995); 47 C.F.R. §§ 24.320(b), 24.720(b).

*and Order* to the extent that elections now may be made for each Major Trading Area ("MTA").<sup>11</sup> Formerly, licensees were required to make the same election for all their licenses.

**E. Steps taken to minimize the significant economic impact on small entities, and significant alternatives considered.**

As noted in the FRFA of the *Second Report and Order*, the Commission analyzed the significant economic impact on small entities and considered significant alternatives.<sup>12</sup> The modifications adopted on reconsideration will further reduce the burden on C block licensees, which are small businesses. These modifications include:

- (1) Elections on an MTA-by-MTA basis. Licensees now will have the flexibility to make elections on an MTA-by-MTA basis, and so are not compelled to make the same election for all their licenses. This modification will afford C block licensees greater flexibility in fashioning a restructuring plan.
- (2) Additional flexibility for licensees. The Commission added flexibility to the amnesty option by offering licensees the choice between receiving a credit for their returned licenses or having the opportunity to bid on their return licenses in the reauction. The Commission also provided additional flexibility by allowing licensees to combine disaggregation with prepayment.
- (3) Higher percentage of down payment credit. By crediting a higher percentage of the down payment under disaggregation, the Commission better enables these small businesses to remain in the wireless market. The Commission provides even more credit to licensees choosing a combination of disaggregation and prepayment in order to encourage licensees to take advantage of the benefits of both these options.
- (4) Thirty-day extension of the non-delinquency period for payments not made on the resumption date. The Commission's 30-day extension is intended to help licensees that are experiencing last-minute delays in raising capital by providing them additional time to complete their fund-raising efforts.
- (5) Clarification of the Affordability Exception. The Commission's clarification of the affordability exception provides an objective means for licensees to implement the exception. It eliminates any doubt or confusion regarding the scope of the term "afford," and it is an easy, bright-line test to administer.

The Commission believes that it is in the public interest to adopt the above modifications in order to facilitate rapid introduction of service to the public without further regulatory or marketplace delay. The Commission's decision minimizes the potential significant economic impact on small entities by permitting C block licensees to choose among a variety of alternative solutions to reduce

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<sup>11</sup> See *Second Report and Order*, Appendix C.

<sup>12</sup> *Id.*

their debt to the Commission. The intent of this *Order* is to alleviate, to some extent, the financial difficulties faced by these small entities by providing options that: (1) achieve a degree of fairness to all parties, including losing bidders in the C block auction; (2) continue to promote competition and participation by smaller businesses in providing broadband PCS service; and (3) avoid solutions that merely prolong uncertainty.

The Commission rejected proposals for a further deferral of the payment resumption deadline because licensees already have had a sufficient deferral period. In addition, the Commission does not wish to adopt temporary solutions that might only postpone the difficulties faced by the C block licensees and further prolong uncertainty. There is no guarantee that an extended deferral period would improve the long term financial outlook facing many licensees. The Commission also rejected arguments that licensees should receive full credit for down payments made on licenses or spectrum returned to the Commission for reauction. The Commission already provides substantial use of a licensee's down payment. Moreover, providing full credit would be unfair to unsuccessful bidders that withdrew from the C block auction.

#### **F. Report to Congress.**

The Commission shall send a copy of the *Order*, including this Supplemental FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. § 801(a)(1)(A). A copy of the *Order* and this FRFA (or summary thereof) will be published in the *Federal Register*. *See* 5 U.S.C. § 604(b). A copy of the *Order* and this FRFA will also be sent to the Chief Counsel for Advocacy of the Small Business Administration.

**Statement of  
Commissioner Susan Ness  
Concurring in Part, Dissenting in Part**

*Re: Amendment of the Commission's Rules Regarding Installment Payment Financing for C block Personal Communications Service (PCS) Licensees, WT Docket No. 97-82*

I concur in today's decision to the extent it affirms the Commission's decision of September 25, 1997, and dissent to the extent it does not. I am pleased that the majority has generally adhered to the framework established last fall. But I do not support the revised package of options being afforded to C block licensees, which I believe is an excessive and potentially counterproductive government intervention in the marketplace. In addition, I am troubled by the majority's willingness to indefinitely delay reauction of returned licenses.

My disagreements with the majority are real, and they are substantial, but they are also respectful. As with many of the judgments the Commissioners are called upon to make, reasonable people can disagree. So here.

Although I supported the Commission's prior decision, I have welcomed the opportunity to think anew on these issues. Reconsideration presents an opportunity -- and a duty -- to consider the matter with a fresh eye. I have used the reconsideration process to test the facts and logic undergirding the Commission's prior decision, to seek additional information and ideas, and to deliberate with a new group of colleagues who bring diverse backgrounds and fresh insights to the process.

And yet this process has left unshaken the core convictions that were central to my thinking last September. Spectrum auctions cannot achieve their full promise as a method of assigning rights to use the public airwaves if, after the fact, government interposes itself into the marketplace to alter market outcomes and favor one group of competitors over another group of competitors.

It remains my view that the C block auction, like the other spectrum auctions the Commission has administered, was run fairly. At the time of the auction, the playing field was level. Everyone believed they were playing by the same rules. Each bidder was on notice to take our rules into consideration when they bid, including the installment terms. Every bid, by every bidder, was entirely voluntary.

As prices rose, some bidders dropped out, believing that others were misjudging the market, and banked on the opportunity to obtain licenses in the event of defaults, license cancellation, and reauction -- the way the FCC said it would work. Others, judging the market potential differently, stayed in. The FCC owes an equal duty to all of these bidders. In my view, today's decision breaches that duty.

In September, we departed in a limited fashion from strict adherence to market mechanisms, and the majority has now moved further down the slippery slope. In the wake of today's decision, we can reasonably anticipate that these licensees, or those in other spectrum blocks, will seek other accommodations on future occasions. This is the inevitable result when government too readily intervenes to protect market participants from failure.

The real damage here is to our role as steward of the public airwaves. Our responsibilities are to facilitate use of the spectrum to bring competitive services to the public, to be fair to all parties (licensees and disappointed bidders alike), and to rely on marketplace forces rather than government edict to select winners and losers. Having placed spectrum in an auction with fair rules known to all parties, we should not intrude on the marketplace after the auction for the purpose of assisting some parties to remain licensees. The marketplace is far better suited than we are to determine the capabilities of licensees, and to provide support for those business plans that make economic sense.

Moreover, financial markets need regulatory certainty and predictability of outcomes. Otherwise the regulatory risk is too great to warrant investment. Wall Street needs the C block licensees to get on with business. Our September decision met with some applause, in part because it contributed certainty to the marketplace and allowed participants, equipment manufacturers, and suppliers of venture capital to proceed. The measures the majority takes today regretfully foster more uncertainty and unpredictability.

### **Specific Concerns**

Although the majority has maintained the basic framework of the decision rendered last September, there are fundamental differences between what the Commission did then and what it is doing now. The new approach will entail greater governmental intrusion in the marketplace, more disruption of business plans, and more delays in C block construction and operation.

The options afforded last September were painstakingly tailored to maintain consistency with auction results and to speed the resumption of normal operation of the market. These options were designed to enable some licensees to exit their predicaments; others to regroup; and still others to refocus their energies on executing their business plan. Given the growing competition in the wireless marketplace, I believed it to be important to enable those C block licensees which were able to do so to "get back to business" as soon as possible. For that reason, one virtue of the options set forth in our September decision was that they were designed to give a modest hand to those most in need, not to create incentives for those

licensees capable of proceeding under their original agreements to abandon their business plans.

As noted above, the majority is retaining the basic framework of September's decision, but changing it in significant ways. Today's decision: (1) increases the ability of licensees to credit deposits that otherwise would be forfeit; (2) allows some deposits to be applied against suspension interest; (3) permits licensees to choose among the options on an MTA-by-MTA basis; (4) extends the time when licensees need to either resume their payments or face cancellation of their licenses; *and* (5) indefinitely postpones the reauction. Taken in combination, the new array of options is complex, confusing, and overly intrusive in the marketplace.

The decision today takes what had been a menu of measured options and turns it into a smorgasbord of hearty choices. The enriched menu of options adopted today may compel all C block licensees to stop and reassess their business plans. Each will now feel obligated to consider whether changing its plans would be more advantageous than proceeding in accordance with the original auction outcome; and many will do so. It is ill-advised and unnecessary to offer new terms that will alter the plans of licensees who were otherwise prepared to proceed. This has extended the delay in settling the C block, and adds to the uncertainty in the financial markets. And most important, we are interfering with market correction mechanisms that would ensure that C block licenses are held by entrepreneurs financially able to provide service to the public.

### **Use of Down Payments**

Of the changes to the plan adopted last September, I am most troubled by those pertaining to the disaggregation option. Previously, those choosing disaggregation were required to forfeit the down payments associated with the portion of the spectrum that was being returned; now, they may use a portion of these funds.<sup>13</sup> But these funds do not belong to a licensee that cannot meet its commitments -- any more than do those paid for an option to buy land that has lapsed or a downpayment on a car that has been repossessed. Yet the majority allows

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<sup>13</sup> The prior decision allowed licensees to redeploy a portion of their down payments only in one limited circumstance -- prepayment. The key considerations that made this approach acceptable to me were that: (1) such licensees were paying the full bid amount on the licenses they retained; and (2) election of this option removed the government entirely from installment payments -- some licenses were fully purchased, and the remaining licenses were returned to the FCC for reauction. The result was that the electing licensee was relieved of suspension interest and all debt owed, in return for purchasing or returning all licenses. The same benefits do not accrue in the disaggregation context, where the licensee continues to receive below-market interest rates and the government continues to administer installment debt.

these funds to be used to pay down principal on the licenses that are kept or, worse, to pay suspension interest.

Using deposits that would otherwise be forfeited to pay suspension interest essentially postpones the time when the licensee's financial ability to construct and operate a service is put to the test. It also is not fair to the licensees who met their obligations and who must raise the money to cover suspension interest payments.

### **Delays in Resumption of Payments and Reauction**

I am also troubled by yet another extensive delay before the date by which licensees will need to resume payments on their licenses. Until such payments are made, the market will not know which licensees are financially viable. The payments already have been suspended for one year. Now, additional time is needed for licensees to sort out their expanded options. At the same time, the grace period for delayed payments is being extended. So we prolong the time during which the licenses will be tied up, with no assurance that the licensees will ultimately be able to finance and construct their systems and provide service to the public.

In addition, I am concerned by the further delay in the timing of the reauction of forfeited licenses. A reauction is needed to put licenses in the hands of those capable of putting them to productive use. It will also create long-awaited opportunities for those designated entities that, in the prior auction, consciously and responsibly chose not to bid more than they could pay. And yet, in today's order, the majority indefinitely postpones the reauction. Last year, we said it would occur in the third quarter of 1998. Just two months ago, the new Commission committed to a date of September 29, 1998. Now, the reauction is deferred until further notice.

Still more delay is inherent in the Commission's inaction on rules for the C block reauction. These rules were proposed in the same September order that here is under reconsideration and for which the comment period has ended. Yet even though decisions on some issues in that proceeding could affect the elections from among the newly expanded options, the majority has declined to settle those issues today.

### **Competing Objectives**

The agency is caught between conflicting concerns. Everyone agrees, at least as a general principle, that it is vital to maintain the integrity of the auction process. Yet we naturally are drawn to help C block licensees who are facing hardship. Behind the corporate names printed on the licenses and the petitions for relief stand real people -- small business owners, entrepreneurs, individual investors, and others, many of them women and minorities -- facing real problems. I -- like my colleagues -- am drawn to help them.

But it is impossible to fully reconcile a commitment to fair market-driven spectrum assignments with a willingness to change the rules of the game after it has been played. At

some point, one objective must prevail over the other. In my judgment, where the objectives collide, the integrity of the process must control, and the desire to help individual players must yield.

If we really believe in assigning spectrum by auctions as authorized by Congress in the Omnibus Budget Reconciliation Act of 1993, and the "procompetitive, deregulatory" paradigm of the Telecommunications Act of 1996, we must accept the reality that some licensees will fail in the marketplace, and that their conditional licenses will need to be canceled and reaucted, as our rules envisioned. Such outcomes are painful, but necessary, if the marketplace is to work its magic.

My disagreement with the majority concerns the lengths to which the Commission should go in trying to prevent such outcomes.

Judges and legislators, lawyers and economists -- all speak to the need to promote and protect *competition*, not *competitors*. In my opinion, today's decision crosses the line to favor specific competitors over others. I cannot support that result.

Some parties have suggested that the Commission owes a duty to go to extra lengths because the C block licensees are all small business "designated entities." This argument misses the point that, with or without *post hoc* relief, the C block spectrum will remain exclusively for designated entities. What is at issue is a clash *not* between the interests of small entities and those of large conglomerates. Rather, the issue is whether the FCC should favor one group of designated entities over another. I do not believe it should.

### **The Commission's Role**

The Commission's intervention in the post-auction market is neither compelled nor excused by the ongoing financial obligation of the C block licensees to the U.S. Treasury. The Commission's fundamental role is that of a licensing agency, not that of a lender. Although the agency's C block rules enabled designated entities to purchase spectrum rights with installment payments, as Congress specifically contemplated (47 U.S.C. §309(j)(4)(A)), our responsibility after the auction was to issue licenses, which were expressly conditioned upon the licensees' fulfillment of their financial commitments.

Those who say the Commission functioned as a banker are mistaken. We never performed the banker's role (which I know well) of reviewing the bidders' balance sheets, their business plans, the wisdom of their planned bids, and the quality of their management. We never assumed the responsibility of creating "commercially reasonable alternatives" for whatever difficulties the C block licenses encountered. To the contrary, we repeatedly declared our

commitment to the efficacy of the market mechanism, and our intention to enforce auction rules.<sup>14</sup>

## **Conclusion**

Today's decision may enable the survival of some C block licensees who might have failed without government intervention. More likely is the prospect that the significantly sweetened selection of options will lead directly to more churn in business plans, more deviation from initial auction results, more confusion in the financial markets, and more delay in construction of facilities. A further cost is the long-term skepticism in the market that the Commission will revise its rules whenever the pressure is great enough.

It is my view that these rule changes prolong uncertainty, and fail to treat all interested parties equitably. Accordingly, to the extent the majority goes beyond the terms of last September's order, I respectfully dissent.

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<sup>14</sup> I note that the Commission acted without hesitation when some successful C block bidders failed to make their down payments although they had made their deposits. The FCC immediately defaulted the bidders and assessed maximum forfeitures, applying all payments to the forfeitures. See "18 Defaulted PCS licenses to be Reauctioned; Reauction to Begin July 3rd," Public Notice, DA 96-872 (rel. May 30, 1996); Mountain Solutions LTD, Inc., Order, 12 FCC Rcd 5904 (WTB 1997), application for review pending; BDPCS, Inc., Order, 12 FCC Rcd 6606 (WTB 1997), application for review pending; C.H. PCS Inc., Order, 11 FCC Rcd 22430 (WTB 1996). These bidders, and those who dropped out in the course of the auction, had no reason to expect that the Commission would subsequently change the rules of the game. It is of course impossible to sort out how these bidders would have behaved differently if they could have foreseen the accommodations that would later be offered.

**SEPARATE STATEMENT OF COMMISSIONER MICHAEL POWELL,  
CONCURRING IN PART AND DISSENTING IN PART**

**Re: Amendment of the Commission's Rules Regarding Installment Payment Financing  
For Personal Communications Services (PCS) Licensees (WT Docket No. 97-82)**

On a fateful day in March of 1997, the Commission's Wireless Telecommunications Bureau -- at the urging of certain C-block auction winners and with all good intentions -- suspended installment payments for C-block licensees. This action set forth in motion, in my observation, a calamity of sorts that now culminates in yet another round (hopefully the last) of "March Madness." We are asked to reconsider the prior Commission's decision from last September which offered measured relief to the successful C-block auction participants, primarily out of some concern that licenses might get tied up in bankruptcy court should many of these companies default. I support that prior decision and its rationale.

As I explain more fully below, I also endorse our decision to keep the basic framework established in our prior order and to reject proposals to radically change the rules of the game. Though I support most of the modest measures we take here, I believe that more substantial modifications to help a small subset of C-block companies that find themselves unable to meet the original terms and conditions of the auction would do more harm than good. Specifically, I believe that to do so would severely compromise the prospects for both existing and future small businesses and other designated entities to raise sufficient capital to compete effectively in the marketplace.

The C-block was established out of a recognition that small businesses and entrepreneurs, including minorities and women, faced particularly difficult challenges in raising sufficient capital to compete at auction for spectrum and for financing their eventual build-outs. The rules were designed to ensure a fair opportunity to obtain spectrum (by segregating a block and holding it out exclusively for these interests) and to provide more lenient, below-market payment terms to ease the burden of raising capital to bid for spectrum and to finance build-out. In hindsight, one might question the financing terms in light of their unintended consequences, but they were nonetheless the rules of the game established for all to abide by.

Rules, by their very nature, will always be both over-inclusive and under-inclusive. That is, they benefit some they really should not, and they will disadvantage others that should benefit. The virtue of any rule, however, is that it provides a degree of certainty and clarity. Rules should allow all players to understand the terms and conditions of the contest and to reliably predict the results of complying or failing to comply with them. In the context of an auction, relying on the established rules allows participants to evaluate the consequences of their bids -- bid too high and fail to make a payment and you will forfeit your (or your investors') money and lose your license, bid too low and you risk losing the opportunity to hold a lucrative license. In the C-block auction, all participants made these difficult decisions all along the way -- some dropped out, some stayed in. The risk assessments and decisions that each participant made were anchored in the terms and conditions of the auction as well as their vision of the future market. As long as the rules were clearly established, the participants could make their own judgments about their risk tolerance, then knowingly face the consequences of their judgments and be held responsible in the event of market failures.

When the referee (in this case, the Commission) starts tinkering with the rules during the game, or worse after the buzzer has sounded, it does two very unfortunate things: First, it

undermines the fairness of the contest. This we know from the earliest age and the principle is echoed on ball fields and gymnasium floors, in olympic arenas, during board games, and even in politics. The cardinal principle is that whether the rule is good or bad it must apply equally to all players or the game is patently arbitrary and unfair and the outcome invalid. There assuredly are always those that support the referee's intervention, because the resulting changes put them on top, or keep them in the lead. However, there are others that sit back in the locker room stunned and dismayed that the rules, advertised as conditions for victory, were changed to accommodate certain players. Second, and most importantly in my mind, is that by telegraphing to the world that the game is subject to unpredictable changes in the rules based on the subjective decisions of the tournament organizers, you discourage people from playing the game at all.

If we constantly adjust our rules to "help" certain players, no matter how sympathetic their plight, we run the very severe risk of foreclosing future opportunities for this very class of players to enter, and compete effectively, in future games. Most telecommunications contests require money to enter and more money to win. It is difficult enough for small, often unproven, companies to raise funds because of the risk associated with their ventures. The Commission should not, by waxing and waning on the regulatory structure, make it more difficult by adding to the uncertainty. If we demonstrate that we are an unreliable referee, capital markets will be unwilling to take the additional risks associated with the regulatory uncertainty that befalls a process by which the rules can be altered at any time based on the sympathies that happen to win the day .

There are acute risks associated with the type of ventures C-block was designed to help, over which regulators have no control, but which are key risk factors for potential investors. This heightens my fear of tipping the risk scale against these companies. It should be remembered that to investors, the entities now seeking our help are inherently risky ventures to begin with. Often their management is less proven, their business plans are untested and less complete, and their optimism is sometimes overstated. This is before consideration of the stiff competition such entities will face in the marketplace if they do win a license in an auction. The additional risk we introduce by demonstrating that our rules are not truly reliable may be more than investors can bear. I sincerely question whether the events of the past and even the little bit we offer to parties in financial distress today is worth the further damage we may do to the risk calculations of investors tomorrow. The sad result being that the very class of people we hope to help now will be left short later.

This Order provides a number of measures I fully support, for they should provide each C-block licensee slightly more flexibility and, consequently, a fighting chance to attract financing, build-out and compete. Most of them clean up imperfections in the original order without doing damage to the underlying principles. In particular, with the added flexibility of the MTA-by-MTA choice of options, we have taken away the artificial and unnecessary nationalization of the C-block "relief" plan. Instead, business plans and investment pitches can continue despite the circumstances facing these licensees. I must depart from the majority on one point, however: allowing participants to use certain down-payment "credits" and continue paying installments.

The prior decision in September made the appropriate cut to allow licensees that have received a payment respite to spread their payment of accrued interest over two years. This provided a reasonable deferral of the payments that could be absorbed into a workable business plan. However, the majority is allowing a portion of the down payments from returned licenses to

be used to pay down what is rightfully owed to the government under binding promissory notes and license conditions. While I do not oppose the use of "credits" to encourage licensees to prepay their debt and get the FCC out of the banking business, I object to the idea that such credits can be used to give a boost to certain players with substantial amounts of accumulated interest. In turn, there will be absolutely no realizable benefit to the American tax payers. From a lender's point of view (which we unfortunately have to take on behalf of the United States), I do not believe that this is "commercially reasonable:" it will more likely just delay the inevitable for some licensees, provide free pocket money for key investors and principals, and not have any guaranteed positive affect on build-out investment. If credits are available to licensees that disaggregate, I would prefer that such credits be limited to prepayment of principal instead of this temporary, partial reprieve that really will not help as much in the short term as it will hurt in the long term.

Some believe that efficient spectrum management counsels that it is better to keep as many of the present winners moving forward, rather than incur the additional administrative expense and risk of reclaiming licenses and re-auctioning them. Perhaps, but that is not what we advertised to the original bidders, many of whom dropped out of the auction confident they would get a second bite at the apple if and when the high bidders failed. Furthermore, it seems to me that this belief as applied precipitously devalues auction integrity and its impact on future auctions, and has no principled limits to constrain our subjective benevolence.

I should make one final point. Last summer, it is my understanding that many parties invoked the fear of bankruptcy in developing options and arguments, but in reaching today's decision I heard very little discussion whatsoever about more impending bankruptcies. I did not hear anyone argue that the changes we make today would truly lessen that troubling possibility for the bulk of the licensees. And, I heard very little compelling evidence that the threat, whatever it may have been, is any more likely today than it was in September when the Commission first offered a number of options. Let me be clear that I too am anxious to see the C-block winners survive and provide an important source of competition, but not in a manner that will foreclose real opportunity for such groups in the future. Indeed, I expect to continue to hear about more C-block success stories than failures.

At least, however, the regulatory game is over. The buzzer has sounded. The time has come to compete in the marketplace, not the bureaucracy. There can be no more regulatory meddling, or horse trading. We must provide certainty, now, lest we win the battle only to lose the war.

## **Separate Statement of Commissioner Gloria Tristani**

### **In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses**

#### **Order on Reconsideration of the Second Report and Order**

I am heartened that the Commission has agreed to a package of fair, reasonable, and commercially viable options addressing the financial issues confronted by C block licensees. And I am hopeful that the majority of licensees will find among these options the flexibility to pursue their business plans as they best see fit. I am satisfied that the Commission has done virtually all that it can to provide C block licensees flexibility and relief consistent with and required by our overriding mandate to manage the spectrum in the public interest, and so I join the majority's decision. I write separately, however, to articulate the fundamental principles guiding my decision. Those principles would have led me to support greater relief in the treatment of the down payment credit.

In granting the Commission authority to assign spectrum licenses by auction, Congress directed us to use that authority for the ends of promoting the development and rapid deployment of new technologies and services for the public, facilitating economic opportunity for designated entities and new entrants, and vigorously fostering competition. I take these directives as the lodestar of my decision.

Much has been written about the need to protect the integrity and fundamental fairness of our auctions. With this, I fully agree. But I also believe that when the Commission acted last September, it was generally acknowledged that a significant number of C block licensees, holding licenses covering a majority of the United States, were in financial distress. The financial difficulties of several of the largest licensees cast shadows of doubt across many of the smaller licensees because of the largely interdependent nature of the licenses as building blocks for a nationwide network.

Recognizing the severity of the problem, and its responsibility to assure that this spectrum is used in the public interest, the Commission appropriately decided last year to modify its rules to provide licensees with modest, but tangible, relief. By offering relief through a public notice and comment rulemaking, we have been able to uniformly address the rights of a class of licensees without undermining the integrity of our auctions program.

Some commenters and licensees would have us go further -- to discount and restructure their debt, much as an ordinary commercial lender might. Yet the Commission is not a commercial lender, and we are confronted by competing policies as we negotiate a path as both lender and regulator. In our role as spectrum manager, it is not appropriate for the Commission to assure the success of any class of licensees. C block is an entrepreneurs' block. The truth is that entrepreneurs and small businesses do fail. And they fail at a rate greater than other businesses overall. So it would be inadvisable for the Commission to tie its spectrum management policy to the assured success of any group of licensees; to seek to avoid bankruptcies at all costs; or to become an apologist when such bankruptcies do occur. Fairness to *all* auctions participants requires that we not adopt measures that would

significantly alter the financial obligations that the successful bidders themselves freely assumed at auction. But we can, and should, give them the opportunity to survive and thrive.

Today's decision provides that opportunity by granting licensees significant flexibility to modify their holdings in light of market conditions and business plans. We have upheld the Commission's original decision to provide a variety of options, recognizing that no single option would be appropriate for all. The character of the relief offered is to allow licensees to surrender a certain amount of spectrum in exchange for a proportionate reduction in debt. In addition, we offer further flexibility, so that licensees may adopt different options in different regions (on a MTA basis), as well as combine prepayment and disaggregation.

Inherent in this approach is a focus on whether the licensee chooses to use or relinquish the spectrum it currently holds. Having decided to grant licensees this relief through flexibility, I believe that the use or non-use of the spectrum should remain the central point in structuring the relief options. Such a view is constructive and forward-looking, rather than focusing on whether certain licensees willfully overbid, or inadvertently overbid, or whether they overbid at all. Such past actions of any individual licensees become irrelevant, I believe, in light of our affirmation of the Commission's decision to offer comprehensive relief and flexibility to all licensees.

Centering on whether a licensee intends to use its spectrum to provide service to the public, or whether it plans to return it, my approach would lead to a different treatment of the licensee's 10% down payment on deposit with the Commission. I do not disagree that it is appropriate for some small fee or cost to be associated with the abandonment of spectrum previously bid for, whether surrendered in a 30 MHz or 15 MHz portion. I join the majority's view that 3% of the net bid (equal to 30% of the down payment), which it adopted for most of the options, is appropriate. However, I view this cost as akin to fee for restructuring, much as a commercial bank might impose. It acknowledges the cost of the restructuring, and is in exchange for the benefits of relief from a substantial portion of debt and the creation of an automatic spectrum market (in the case of disaggregation), or the opportunity to hold an unencumbered license (in the case of prepayment). But 3% of the net bid, or 30% of the down payment, also is minimal enough not to act as a disincentive or a penalty for a licensee making a choice which the Commission has otherwise freely offered. I would not view this cost as a "deterrent to speculative bidding," which is a redressed description of a penalty for past behavior.

This cost should be associated only with the abandonment of the spectrum. The licensee would forfeit 30% of the down payment that relates to the spectrum it chooses to return, whether as a whole 30 MHz license (under the pure prepayment option) or 15 MHz piece (under either disaggregation option). Correspondingly, the licensee would retain 100% of the down payment that relates to the spectrum it chooses to keep. Critically, licensees are not penalized to the extent that they choose to go forward with providing service to the public. This approach -- focusing on the use of the spectrum -- is consistent with our spectrum management responsibilities, as expressed in Section 309(j), to promote service to the public, provide opportunity for new entrants, and foster competition.

Basing the fee on the amount of spectrum returned results in varying credits of the down payment. Licensees would receive a 70% credit for a full license returned under the prepayment option, while receiving 85% credit for a license disaggregated, whether then prepaid or continued on installment payments. Some suggest that the lack of parallel treatment is a problem -- that each license should be subject to the same fee, whatever option is chosen. But the size or design

of a license is itself arbitrary, as acknowledged by the fact that the Commission has either adopted or proposed spectrum partitioning and disaggregation rules for the majority of commercial mobile radio services. A cost per license would be a cost merely to participate in the choices we offer. That analysis is more characteristic of a bank, less a manager of the spectrum.

Likewise, today's Order suggests that we should provide greater incentives for licensees to select the prepayment option, because it has the effect of removing the Commission from the banking business. I believe this analysis has two flaws. First, any modification to the credit of the 10% down payment will affect a licensee's choice of prepayment marginally, if at all. A decision to prepay will be made on the overall economic costs and benefits to the licensee. Although prepayment may be a good option for some -- particularly those able to obtain down payment credits for the surrender of other licenses -- for others it will not, because it does not account for loss of government financing substantially below their cost of funds in the private market. Because the installment payment plan was offered at the government's cost of funds, a prepayment option discounted to the licensee's higher cost of funds would not be economically neutral to the government. For that reason, and because such a discount would fundamentally change the terms under which these bidders won (and others lost) these licenses, I agree with the decision not to discount the debt. Nonetheless, I believe we must recognize that such a decision affects the overall economic attractiveness of prepayment. A modest tinkering with the credit of the down payment to lessen the credit for disaggregation with resumption of payments, and to increase the credit for disaggregation with prepayment, will not affect that balance.

In addition, for C block the decision for the Commission to serve as a banker is over. That decision was complete with the adoption of service rules. Whether prepayment is a good option for some, we will remain banker for many. Though I agreed with our decision in the recent Part 1 Report and Order to temporarily suspend the use of installment payments in future rulemaking proceedings, I do not believe we should distinguish the cost of an option based upon whether it minimally reduces our banking role for this service.

Thus, I would offer an 85% credit for any licensee choosing the disaggregation option, whether prepaying or continuing on installment payments. I would not tinker with the calculation of the down payment credit, merely to make disaggregation with installment payments cosmetically equal to standard prepayment, or to make disaggregation with prepayment more attractive than disaggregation with installment payments. It is easier -- and more in the public interest -- simply to ask whether the licensee is choosing to serve the public by making use of the spectrum. Despite these decisional differences, I am pleased that the majority is able to support use of 85% of the down payment for at least one of the disaggregation options.

There is an additional area where I believe we provide important and useful flexibility. This is the modification to allow licensees to apply to the down payment credit either to reduce principal or to apply against accumulated suspension interest. Suspension interest is, in effect, a past debt. It has accumulated because the Commission, by Bureau Order, suspended payments pending resolution of this proceeding. Allowing application of the credits to suspension interest will provide licensees modest relief from the burden of paying both past and current interest simultaneously. At the same time, we do not defer current debt. To take advantage of this option, licensees must be timely on all current interest, making a showing of financial viability.